90-519

Supreme Court, U.S.
FILED
AUG 29 1990
JOSEPH E. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAY D. HIRSCH,

Petitioner,

v.

OAKELEY VAUGHAN UNDERWRITING LIMITED, *et al,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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August 29, 1990

QUESTIONS PRESENTED

1. When a foreign defendant invokes the Doctrine of Forum Non Conveniens against a resident American citizen plaintiff suing in his own right in a Federal District Court, does the District Court's failure to accord substantial deference to plaintiff's choice of forum authorize affirmance by a Federal Court of Appeals of dismissal of the lawsuit when the alternative forum is a foreign court?

2. When a Federal District Court fails to expressly address and balance the public and private factors relating to a resident American citizen Plaintiff's suit in the United States against a foreign defendant and dismisses the suit based upon forum non conveniens, does such failure constitute abuse of discretion invalidating affirmance of such dismissal by a Federal Court of Appeals when the alternative forum is a foreign country?

3. In resolving the issue of an appropriate forum when the alternative forum is a foreign court, when the defendant is foreign and when the plaintiff in Federal District Court is a resident American citizen suing in his own right, can a Federal District Court's dismissal be properly affirmed when the Appeals Court can not discern the implementation of the "deference" concept?

4. In resolving the issue of an appropriate forum when the alternative forum is a foreign court, when the defendant is foreign and when the plaintiff in federal district court is a resident American citizen in his own right, can a federal district court's dismissal be properly affirmed when the Appeals Court by application of an incorrect standard or scope of appellate review also arrives at a dismissal determination?

LIST OF ALL PARTIES

The parties to the proceeding in the Fifth Circuit Court of Appeals were:

1. Petitioner, JAY D. HIRSCH.

2. Respondents, OAKELEY VAUGHAN UNDERWRITING LIMITED; CHARLES A.B. ST.GEORGE; MARK E.P. ST.GEORGE; EDWARD ST.GEORGE; JAMES ST.GEORGE; OAKELEY VAUGHAN AND COMPANY LIMITED; THE CORPORATION OF LLOYD'S; THE COUNCIL OF LLOYD'S; THE SOCIETY OF LLOYD'S.

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THE SOCIETY OF LLOYD'S, *et al,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, JAY D. HIRSCH, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on May 31, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unpublished and is reprinted in the appendix hereto. The memorandum decision of the United States District Court for the Southern District of Texas (NORMAN BLACK, D.J.) has not been reported. It is reprinted in the appendix hereto.

JURISDICTION

Petitioner initially brought suit in a Texas District Court located in Houston, Harris County, Texas. Respondents removed the case pursuant to 28 U.S.C. § 1441 (1988), based upon diversity jurisdiction, 28 U.S.C. § 1332 (1976). Respondents filed Motions for Dismissal under Rule 12(b) and sought dismissal based upon the doctrine of forum non conveniens. On December 14, 1988, the Federal District Judge dismissed Petitioner's suit on the basis of forum non conveniens and entered final judgment of dismissal with prejudice. On April 12, 1989, the Federal District Court reaffirmed its dismissal on the basis of the common law doctrine of forum non conveniens.

On Petitioner's appeal, the Fifth Circuit Court of Appeals rendered judgment and opinion of May 31, 1990, affirming the District Court's dismissal. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Fifth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1) (1988).

STATEMENT OF THE CASE

Petitioner was, at all times pertinent to this matter, a United States citizen, born in Houston, Harris County, Texas, since 1938. On September 5, 1986, Petitioner instituted suit in the 281st Judicial District Court of Harris County, Texas, against various individuals and several entities associated with Lloyd's and Oakeley Vaughan. By virtue of amendment of that suit, on October 16, 1987, all parties who are now Respondents had been joined. Suit was brought on claims founded on fraud, negligence, breaches of fiduciary duty and contract, conspiracy and statutory violations of Texas consumer and insurance laws.

Petitioner became an underwriting member, or "NAME" of Lloyd's on December 31, 1980. Petitioner was not willing to assume the financial devastation stemming from syndicate risks and losses directly traceable to the failure of Lloyd's to discharge

certain duties and obligations owing to Petitioner as a "member" or "name." These duties were promised to Petitioner within the State of Texas as part of the campaign of solicitation carried on by, and on behalf of, agents and representatives of Lloyd's and the sponsor, namely Oakeley Vaughan Underwriting Limited, which was approved by the COMMITTEE OF LLOYD'S as one of its underwriting agents.

There are only two events linking Petitioner to what the District Court determined to be the more convenient forum, namely, London, England. These two events are: (1) Petitioner's appearance before the ROTA COMMITTEE which meeting lasted about five (5) minutes and occurred in London, England. The *Brochure for United States Applicants for Underwriting Membership* issued by the COMMITTEE OF LLOYD'S explains that the ROTA COMMITTEE is composed of members of the Committee of Lloyd's. Approval by the ROTA COMMITTEE is a Lloyd's imposed requisite to election by the full Committee of Lloyd's; (2) Petitioner's signing of an Underwriting Agency Agreement with Oakeley Vaughan Underwriting Limited.

Besides these two events, all other contact occurred within the State of Texas either by personal contact with Petitioner, or by telephone or mail. All other documents involved in Petitioner's membership application were generated or executed within the State of Texas, more specifically, in Houston, Texas.

Respondents' initial contact with Petitioner involved a personal visit by Wilfred Sherman. Sherman's visit was followed up by an October 11, 1978, letter to Petitioner from Oakeley Vaughan Underwriting Limited's Director, Cavenagh-Mainwaring, who transmitted to Petitioner the *Brochure for United States Applicants for Underwriting Membership*. The brochure laid the groundwork for the subsequent contacts with Petitioner by stating on its first page:

> Any questions with respect to materials contained herein should be addressed to the Agent and/or Member who is sponsoring the application for membership of Lloyd's.

The brochure consists of a thorough explanation of the structure of Lloyd's, the development of syndicates, the exposition of the Corporation of Lloyd's and, with respect to Underwriting Agents, states the following:

> The Underwriting Agent has a duty to his NAMES on the one hand to conduct the underwriting affairs in as efficient a manner as possible, and to the Committee of Lloyd's on the other to see that its requirements are complied with on behalf of the NAMES for whom he acts.
>
> 2.8 Each Member of Lloyd's is required to enter into an Underwriting Agency Agreement with his Underwriting Agency . . . The Underwriting Agent normally is given complete control of the underwriting affairs of the MEMBER.

With the benefits of the representations and consultation involving Wilfred Sherman who had been a member or "name" of Lloyd's since the early seventies, and who held himself out to Petitioner as a Lloyd's "overseas consultant," Petitioner pursued his quest for Lloyd's membership and learned the basic structure of the investment situation through meetings and contacts in Houston, Texas. Petitioner met with Eric Fowler who assisted Petitioner in the preparation of his application and who included references to specific syndicates on the application. Fowler was an official of Oakeley Vaughan Underwriting Limited and represented to Petitioner to be working for Lloyd's. All of the required information for the application was gathered in Houston, Texas. Petitioner was also visited by David Howard and Mark St.George, both of whom indicated to Petitioner that they were Lloyd's representatives who were furthering the interests of Oakeley Vaughan Underwriting Limited and the various St.George Respondents. Petitioner undertook the following activities, all of which occurred within Houston, Texas, involved:

1. Completed a Certificate of Means regarding his personal wealth;
2. Secured a Letter of Credit at Allied Bank of Texas in the sum of 70,000.00 pounds sterling issued to the Corporation of Lloyd's as beneficiary;

3. Executed various documents which implemented the Lloyd's application such as the Lloyd's Premium Trust Deed and Special Reserve Fund Trust Deed which was executed in Houston. Texas, after the ROTA COMMITTEE meeting in London, England;
4. Paid all fees and charges required of him, such as a non-refundable fee of 1,900.00 pounds sterling to the Committee of Lloyd's upon election as a member;
5. Executed the Lloyd's Underwriting Members' Security, also referred to as a Deposit Trust Deed;
6. Executed an APPLICATION FOR UNDERWRITING MEMBERSHIP;
7. Executed a Certificate of Means;
8. Executed and completed a questionnaire involving his assets and income submitted by Oakeley Vaughan (Underwriting) Limited;
9. Executed the UNDERTAKING ON APPLICATION FOR ADMISSION AS AN UNDERWRITING MEMBER OF LLOYD'S.

The time span between Petitioner's application for underwriting membership and election as an underwriting member covered the period between July 28, 1980, and December 31, 1980. Of course, Petitioner had personal contacts within Houston, Texas, prior to that time with Lloyd's representatives, E. R. Fowler and David Howard. Even though these individuals, including Mark St.George, were actually agents and representatives of Oakeley Vaughan Underwriting Limited, they functioned in a dual capacity as representatives of Lloyd's by virtue of two (2) circumstances:

1. Lloyd's knew that agents and representatives of Oakeley Vaughan Underwriting Limited were sponsoring and promoting Petitioner's application for membership;
2. The sponsorship and involvement of a Lloyd's-approved underwriting agent is a necessary and critical aspect of the

entire application procedure as conceived and supervised by Lloyd's.

In short, the conception and structure of application for underwriting membership with Lloyd's focuses on the active participation of a Lloyd's-approved underwriting agent.

Petitioner's key contentions as to why the membership application process is the primary focus for the forum non conveniens analysis are the following:

1. The participation of a Lloyd's-approved underwriting agent in the application process is an absolute requirement of Lloyd's;

2. That the application for membership must contain the syndicate in which the prospective member will participate if membership is approved, is a requirement of Lloyd's;

3. The participation of the underwriting agent in this enterprise is, and constitutes, Lloyd's representation to a prospective member that the underwriting agent is trustworthy and "in good standing" with Lloyd's.

4. It was during 1978, the year in which Petitioner was contacted by Oakeley Vaughan Underwriting Limited about the advantages of "membership" in Lloyd's, through the time that Petitioner was elected as a "member," that events and circumstances occurred which Lloyd's should have discovered and/or disclosed so as to prevent Oakeley Vaughan from acting as Petitioner's sponsor and/or prohibited Oakeley Vaughan from offering participation by Petitioner in certain syndicates.

Therefore, relevant here is a summation of Petitioner's allegations as they relate to the relevant time span of the application process. It will be recalled that Petitioner's Application for Underwriting Membership listed, among others, Syndicates 420, 551, and 861 which were "Oakeley Vaughan" syndicates.

During 1979 substantial misconduct occurred on the part of Oakeley Vaughan with respect to Syndicate 551 which is reflected in the following allegation by Petitioner in the Trial Court:

> Plaintiff would show further that during 1979 Syndicate 551 brought a reinsurance from the Fen-Re Intercommunity Re Pool through the agency of the Defendant, OAKELEY VAUGHAN & COMPANY LIMITED. On or about December 1981, considerable difficulty was being encountered in the market in obtaining recoveries from the Fen-Re. At that particular time Fen-Re owed to Syndicate 551 a very substantial sum. Defendant, OAKELEY VAUGHAN & COMPANY LIMITED paid to Syndicate 551 a sum in excess of 250,000 pounds in early January 1982, being credits due to the syndicate on its reinsurance claims against various reinsurers, including to the extent of 250,000 pounds to Fen-Re, but which claims had not at that time been collected by OAKELEY VAUGHAN & COMPANY LIMITED from such reinsurers. By making such a payment OAKELEY VAUGHAN & COMPANY LIMITED represented to the names on whose behalf the reinsurance was placed that sums due thereunder were recoverable when they knew or should have known that this was not true.
>
> Plaintiff would further show that in its 1981 account, Syndicate 551 underwrote a U.S. Fire Treaty as a reinsurance of the Insurance Corporation of Ireland. Substantial losses are now being claimed which greatly exceed the premium income allocated for this syndicate. With proper management, OAKELEY VAUGHAN UNDERWRITING LIMITED should have been aware of the fact that the original estimates were being exceeded . . .

In further amplification of misconduct relevant to Syndicates 420, 551 and 862, Petitioner alleged with respect to the Oakeley Vaughan Respondents, Oakeley Vaughan Underwriting Limited and its directors, Charles A.B. St.George, James A.B. St.George, Mark E.P. St.George and Edward St.George as follows:

> Defendants Oakeley Vaughan Underwriting Limited, and its directors, as underwriting agents of Syndicates 420, 551 and 862 were fiduciaries of the Names under said syndicates and had a duty to conduct and manage the underwriting affairs of

said syndicates on behalf of its Names in a reasonable and prudent manner and to comply fully with all the requirements and regulations of the Defendant, LLOYD'S, on behalf of the Names for whom it acted. In underwriting for the accounts of its Names, Defendant, OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors were required to underwrite the amount of premium income provided for by the current regulations of LLOYD'S in relation to the Names, means and deposit. As such, Defendant, OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors were required to take reasonable steps to insure that the amount of insurance business underwritten in Syndicates 420, 551, and 862 would not cause the syndicate premium allocable to a certain year of account to exceed the syndicate allocated capacity for that certain year of account.

Plaintiff, JAY D. HIRSCH, would show that with respect to Syndicates 420, 551 and 862, the Defendants, OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors, had consistently overwritten and exceeded the premium income limits for the 1980 through 1983 years of account in violation of the requirements and regulations of the Defendant, LLOYD'S. In short, the management and directors of Defendant, OAKELEY VAUGHAN UNDERWRITING COMPANY failed to properly and adequately monitor, insure and require that the premiums of Syndicates 420, 551 and 862 did not exceed the limits prescribed by the underwriting agency agreement and the LLOYD'S regulations and requirements. Furthermore, the management and directors of Defendant, OAKELEY VAUGHAN UNDERWRITING LIMITED, failed to properly protect their syndicates and accounts by appropriating proper reinsurance and stop loss insurance.

In the Trial Court, Petitioner complained that neither Lloyd's nor any of the Oakeley Vaughan Respondents ever made disclosure of these circumstances during the rather lengthy period related to Petitioner's application for membership or at any time thereafter. And, that had timely and proper disclosure been made, the membership application would have been stopped by Petitioner or Petitioner would have proceeded with a different

underwriting agent and syndicates. The misconduct of Lloyd's basically was alleged to have consisted of the failure to adequately monitor or keep itself advised of the practices of the Oakeley Vaughan Respondents and therefore, allowing the processing of a membership application which was clearly flawed.

In considering the action of the Trial Court in ordering dismissal, and that of the Court of Appeals, in affirming the same, several factual aspects of the District Judge's memorandum decision and of the Fifth Circuit's opinion require emphasis:

A. The Contract Focus

1. It was the District Judge's assertion that the "dispute arises out of a contract executed in London in November 1980 effective January 1, 1981, between Plaintiff and Oakeley Vaughan Underwriting Limited."

2. In reacting to the District Court's finding, the Fifth Circuit observed:

   The District Court properly found, however, that Hirsch's contract with Lloyd's was executed in London and designated to be performed in England and that Hirsch traveled to England for purposes of this transaction. (See opinion of Fifth Circuit, p.6).

It appears that the District Court and the Fifth Circuit either are referring to different contracts in their respective opinions, or that the contract referred to by the District Court is the same contract referred to by the Fifth Circuit. The issue is important because of the obvious importance of the "contract issue" in the forum non conveniens analysis.

The record is clear and uncontradicted that Petitioner went to London, England, only one time in connection with his membership application in 1980 when he attended the ROTA COMMITTEE meeting. The Underwriting Agency Agreement, regardless of *where* and *when* it was signed, is only of secondary importance in terms of Petitioner's basic complaints in his lawsuit as an American citizen suing in his own right.

The record demonstrates the violation of a more significant contractual relationship which is referred to as the primary contract and which was the primary basis for Petitioner's suit. Peculiarly, it is mentioned by the Fifth Circuit as "Hirsch's contract with Lloyd's." Petitioner contends that the dispute primarily arises out of this primary contract.

THE PRIMARY CONTRACT

The term primary contract refers to the entire undertaking on the part of Petitioner to respond to Lloyd's solicitation to become a member or "name." The record reflects that the situs of this primary contract is in Houston, Texas, because of the active solicitation of Petitioner in Houston, Texas, by agents and representatives of Lloyd's and because of the performance in Houston, Texas, of many acts required to be performed, and because of Petitioner's assumption of duties and liabilities within Houston, Texas, in connection with this primary contract. In addition, the participation of the Lloyd's underwriting agent, in the membership application process, occurred within Houston, Texas. In that connection, the sponsorship and participation by an underwriting agent approved by Lloyd's in the membership application is part of that contractual undertaking.

For example, the *Brochure For United States Applicants For Underwriting Membership* advises as follows:

> 6.1 In order to be eligible to underwrite insurance at Lloyd's, an individual *must apply* and be accepted as a MEMBER OF LLOYD'S. An application is made through an UNDERWRITING AGENT with the sponsorship of an existing MEMBER OF LLOYD'S . . .
>
> 6.2 The first step in the process of becoming a MEMBER OF LLOYD'S is for the sponsor, with the support of an underwriting agent, to write a letter of nomination to the Membership Department at Lloyd's . . .
>
> 6.6 . . . Once an underwriting agent is chosen he will help the potential member through the application procedure. He will also advise the potential member on which syndicates to

> join for his first year of Lloyd's and the maximum premium income to accept on each syndicate. *These syndicates must be named during the application* . . . (Emphasis added).

On the advice of representatives of Lloyd's, Petitioner's application named Syndicates 420, 551 and 862, along with several others. Further, Petitioner was advised, both through personal representations made in Houston, Texas and through Lloyd's printed materials, sent to Houston, Texas, that the underwriting agent involved in the application for membership had specific duties to the applicant.

Lloyd's acceptance and approval of Petitioner's membership application, without ever advising Petitioner of the improprieties and misconduct of his underwriting agent in syndicates listed in his application, tainted the application process and resulting contractual agreements in the first place. Therefore, Petitioner contends that the membership contract is the PRIMARY CONTRACT. Petitioner would submit that the underwriting agency agreement is only the SECONDARY CONTRACT and therefore, of minor importance in both the Petitioner's suit and therefore, the forum non conveniens analysis.

The membership application involves Petitioner's acceptance of duties and responsibilities in Houston, Texas. These items are reflected in the various documents whereby Petitioner recognized that he may be subject to unlimited liability to the full extent of his wealth, that he was willing to encounter the high risks of underwriting and that he might sustain only losses instead of profits. Therefore, it is the primary contract, Petitioner's membership undertaking, in the first place, that both imposes upon Petitioner solemn obligations and provides to Petitioner implied covenants of good faith and fair dealing. It was based upon a breach of such covenants, among other reasons, that Petitioner was compelled to bring suit.

B. The Litigation Focus

To the District Court, the suit involved a dispute arising out of a contract executed in London, England, by Petitioner, who allegedly traveled there for that purpose. In contrast to this extremely limited, factually erroneous, and hyper-technical view of the District Court is the view of the Fifth Circuit. The Fifth Circuit sees this lawsuit as a test and challenge of major proportions:

> This lawsuit aims at the heart of the unique self-regulatory mechanism within Lloyd's, which is a product of complex English legislation. (See Fifth Circuit Opinion, p.7).

The District Court and the Fifth Circuit erred for failure to recognize the suit for what it is, namely, a claim for damages sustained by an American citizen, suing in his own right, and complaining of foreign citizens for defrauding him in his own home town, Houston, Texas.

To simplify issues presented by Petitioner's lawsuit, complaint is made as follows:

1. That Petitioner, an American citizen, was sought out and solicited in his home town, Houston, Texas, for his wealth;

2. That Petitioner was defrauded and deceived through a network of contractual undertakings;

3. That the claim of fraud and deception in the primary contract involved Lloyd's failure to monitor the activities of one of its approved underwriting agents who, as sponsors of Petitioner's application for membership, infected and flawed the application process, so as to "steer" Petitioner to syndicates improperly managed by Oakeley Vaughan Underwriting Limited. In addition, Lloyd's failed to advise Petitioner of its knowledge that the underwriting agent could not be trusted in the selection of syndicates for the application of membership of Lloyd's.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S FORUM NON CONVENIENS ANALYSIS AND APPLICATION CONSTITUTE A STANDARD OF APPELLATE REVIEW WHICH CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

In reviewing the record and the District Court's memorandum decision, the Fifth Circuit sets out its measuring stick at pages 3-4 of its unpublished opinion:

> Our court must affirm the District Court's dismissal either if we agree that Texas was an inconvenient forum or if the District Court had no jurisdiction over the Defendants. If the forum issue is clearer legally and factually, we see no reason to engage in discussion of the latter issue. (Emphasis added).

This approach is in clear conflict with this Court's pronouncement of the scope of appellate review of a trial court's forum non conveniens determinations. The proper scope of appellate review was clearly mandated in *Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235, 102 S. Ct. 252 (1981), in the following terms:

> The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion, where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. Here, the Court of Appeals expressly acknowledged that the standard of review was one of abuse of discretion. In examining the District Court's analysis of the public and private interests, however, the Court of Appeals seems to have lost sight of this rule, and submitted its own judgment from that of the District Court.

454 U.S. at 257 (citations omitted).

Given the mandate from this Honorable Court that the Appellate Court's *own judgment* as to forum non conveniens is "out of bounds," it stands to reason that an erroneous application of the scope of appellate review resulted in the affirmance of a trial court's erroneous dismissal because it would reflect only that both Trial Court and Appellate Court favored dismissal. Consequently, where an Appellate Court, as here, has decided on its own that Texas is an inconvenient forum, it would be reluctant to reverse a Trial Court's dismissal even if it properly evaluated the Trial Court's holding and found error in the same. It is for this reason that the examination focuses on the Trial Court's decision which is entitled to "substantial deference" only if that decision properly implements the test inherent in the application of the doctrine of forum non conveniens. *Piper Aircraft* stated:

> . . . where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

Of course, it is not always a simple task to detect whether an appellate court decision reflects an exposition of its own judgment or is simply a vehicle for review of the trial court's decision. The appellate decision under attack here appears to be of the former type for the following reasons:

1. The Fifth Circuit states that the District Court's dismissal must be affirmed "if we agree that Texas was an inconvenient forum."

2. Nowhere does the Fifth Circuit claim that the District Court complied with the Piper Aircraft mandate. Instead, the Fifth Circuit merely observed that:

   Hirsch (Petitioner) has failed to point out any significant errors of fact or law that cast doubt on the propriety of the District Court's dismissal. Under these circumstances, we cannot find an abuse of discretion." (Fifth Circuit opinion, p.8).

3. In evaluating Petitioner's claim of being disadvantaged if forced to litigate in England, the Fifth Circuit has clearly again indicated that their test is what the Fifth Circuit thinks. The Fifth Circuit stated:

   As for the remaining 'private interest' factors, Hirsch contends that he would be severely disadvantaged by being forced to litigate against these defendants in England. *We disagree.* (Emphasis added).

4. The Fifth Circuit has a significantly different view and concept of the scope of Petitioner's lawsuit from that of the District Court. This conceptualization by the Fifth Circuit is clearly the result of the exercise and substitution of its own judgment rather than the application of the scope of review mandated by this Honorable Court. To the District Court, Petitioner's lawsuit "arises out of a contract executed in London in November, 1980, effective January 1, 1981, between Plaintiff and Oakeley Vaughan Underwriting Ltd." On the other hand, the Fifth Circuit saw Petitioner's lawsuit as a test of and challenge to the "unique self-regulatory mechanism within Lloyd's, which is a product of complex English legislation." It is beyond question that the Fifth Circuit did not defer to the District Court's view of the significance of the dispute in question.

II.

THE FIFTH CIRCUIT'S FORUM NON CONVENIENS ANALYSIS AND APPLICATION CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

A.

THE ABANDONMENT OF THE PIVOTAL CONCEPT OF DEFERENCE TO PLAINTIFF'S CHOICE OF FORUM

Regardless of any present uncertainty as to whether the concept of deference to Plaintiff's choice of forum has been "weakened"

or "diluted" or somehow has become "less significant" in a forum non conveniens analysis, there can be no question about the concept's viability. At no time has this Honorable Court set aside this crucial facet of the doctrine of forum non conveniens. In addition, at no time has this Honorable Court held or implied that the concept of deference to Plaintiff's choice of forum is simply perfunctory. The holdings and inferences in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947), *Koster* v. *Lumberman's Mut. Cas. Co.*, 330 U.S. 518 (1947), *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 102 S. Ct. 252, (1981) and *Cauwenberghe* v. *Biard*, 486 U.S. 517, 108 S. Ct. 1945 (1988), clearly require the following with respect to Plaintiff's choice of forum:

1. That the Plaintiff be given a special advantage in the selection of his own country as a forum;

2. That dismissal must be denied unless the balance of factors tilts strongly in favor of the Defendant;

3. That the District Court must consider all relevant public and private interest factors and must balance them in a reasonable manner.

Consequently, as mandated by this Honorable Court, the District Court's decision must do more than recite some theoretical concept about deference. The District Court's decision must demonstrate how within the context of the case, consideration has been given. While this aspect of the forum non conveniens doctrine is important in the decisions to retain a case, this element is absolutely mandatory in a decision *dismissing* a case. This stems from the fact that the doctrine of forum non conveniens demands that, regardless of the retention or dismissal of a case, the District Court must honor and implement the concept of deference to a Plaintiff's choice of forum.

The dismissal by the District Court and the affirmance of that dismissal by the Fifth Circuit are in direct defiance of the judicially mandated requirement of the emphasis of the deference to Petitioner's choice of forum. The only reference to that

concept, by the District Court is the obviously gratuitous recitation written in the District Court's memorandum opinion:

> However, Plaintiff's choice of forum is accorded substantial weight . . . (Memorandum opinion, p.4).

The only comment by the Fifth Circuit with respect to this principal factor of deference to a plaintiff's choice of forum as it was treated by the District Court was as follows:

> The District Court explicitly recognized that 'Plaintiff's choice of forum is accorded substantial weight and the burden is on the Defendants to establish that the balance of convenience of the parties and witnesses strongly favors dismissal'. (See p.5 of Fifth Circuit opinion).

The frightening prospect is that nowhere did the District Court even attempt to analyze and evaluate Petitioner's choice of forum in any manner and this failure receives the endorsement of the Fifth Circuit. The relatively minimal weight which Petitioner's choice of forum received is quite apparent from the District Court's opinion. After deciding that an alternative forum exists, the Trial Court reasoned:

> A primary consideration in determining whether to dismiss a case for *forum non conveniens* is where the relevant events took place. In this case, the contract was executed in England and the place of performance was designated England. (Memorandum opinion p.4).

Only later, does the District Court make the observation that "Plaintiff's choice of forum is accorded substantial weight."

Even though forum non conveniens decisions are committed to the sound discretion of the District Court, the mere statement of the concept of substantial deference, without more, constitutes an abuse of discretion. This is implicit in this Honorable Court's holdings in *Gilbert, Koster, Piper Aircraft* and *Cauwenberghe*.

The affirmance by the Fifth Circuit clearly violates this principle of deference and is in clear conflict with its own decisions and decisions of other circuits.

Even in *Forsythe* v. *Saudi Arabian Airlines Corp.*, 885 F.2d 285 (5th Cir. 1989), a decision relied on in its unpublished affirmance here, the Fifth Circuit states the Trial Court's duty in this respect as follows:

> The District Judge is also required to set out his findings and conclusions supporting a forum non conveniens determination, because we will not perform a de novo review of this issue. at p.290.

Petitioner's complaint here was well stated when the issue was raised in *Lony* v. *E.I. DuPont de Nemours & Co.*, 886 F.2d 628 (3d Cir. 1989), in which appellant *Lony* made the identical complaint as Petitioner here. The Third Circuit first recites the complaint as follows:

> Lony maintains that the District Court merely restated the rule, failed to say how much deference it gave to the plaintiff's choice of forum, as required by *Lacey*, and, in fact, gave it no deference at all. at p.634.

The Third Circuit's reaction was concise, fair and clearly mandated by the applicable holdings of this Honorable Court. At the outset the Third Circuit stated in response:

> We cannot say that the District Court gave no deference at all to Plaintiff's choice of forum, but it did little beyond restating the rule and filling in the names of the parties. In this case, more than that is required of the District Court.

The Third Circuit then made a partial explication of the duty of the District Court with respect to the handling of the concept of deference to a Plaintiff's choice of forum in a forum non conveniens determination. The Third Circuit stated:

> The District Court must assess whether the considerable evidence of convenience has in this case overcome any reason to refrain from extending full deference to the foreign Plaintiff's choice.

It was the District Court's failure to reason through the analysis of the concept of deference to Plaintiff's choice of forum which led to reversal there. In the view of the Third Circuit:

> The District Court's failure to give adequate consideration to these questions and to make a determination based on the facts of this case was an abuse of discretion and constitutes reversible error.

In *Lacey* v. *Cessna Aircraft Co.*, 862 F.2d 38 (3d Cir. 1988), the Third Circuit gave an excellent exposition of abuse of discretion instances of district court failures such as:

1. Failure to hold defendants to their proper burden on forum non conveniens motion or failure in weighing relevant factors *Reyno* v. *Piper Aircraft Co.*, 630 F.2d 149 (3d Cir. 1980), *rev'd on other grounds*, 454 U.S. 235, 102 S. Ct. 252 (1981).

2. Failure to weigh the relative advantages of each forum but only a consideration of the drawbacks of one, has led to reversal on the basis of abuse of discretion. *Founding Church of Scientology* v. *Verlag*, 536 F.2d 429, 436 (D.C. Cir. 1976).

The Fifth Circuit's affirmance violated the accepted and appropriate form of appellate review of forum non conveniens determinations. In this area, the technique has been the Trial Judge's consideration of factors applicable to such determinations. The consequence of this technique for the scope of appellate review is well set out by Judge Friendly in *Indiscretion About Discretion*, 36 EMORY L.J. 747, 770, 771 (1982):

> If he has faithfully checked out and correctly decided each item, his determination should usually be allowed to stand. Per contra, if he has neglected or misapprehended items that would operate in favor of the losing party, an appellate court will have sound basis for finding that discretion was abused.
>
> Once it has been deemed appropriate to limit the range of discretion, whether through the announcement of a principle

> of preference or the specification of factors, it becomes necessary that the trial court articulate the basis for its decision. Otherwise, it will not be possible for an appellate court to determine whether the trial court's decision rests on an application of the proper rule or the mistaken assumption of some other rule . . . the desirability of a statement of reasons is beyond contest.

In summation, the truth of the meager references by the District Court and Fifth Circuit opinions about Plaintiff's choice of forum is:

1. There never was any discussion or evaluation about Plaintiff's chosen forum;
2. The concern was limited to listing the reasons why the foreign court was an appropriate forum.

The decision of the District Court, and its affirmance by the Fifth Circuit, violate, among other concepts, the concept that a Plaintiff's choice of forum requires the most substantial deference. The District Court must be in a position to accomplish the analysis with due deference to Plaintiff's choice of forum because "the District Court generally becomes entangled in the merits of the underlying dispute." *Cauwenberghe, supra,* at 528.

THE FAILURES OF THE DISTRICT COURT AND OF THE FIFTH CIRCUIT WITH RESPECT TO PETITIONER'S CHOICE OF FORUM

1. Nowhere is Petitioner's nationality, citizenship, or residence noticed or indicated by the District Court or the Fifth Circuit. Petitioner is, in fact, an American-born citizen who has resided all of his life in Houston, Texas, with the exceptions of education and military service requirements that took him to other locations.
2. Nowhere does the District Court or the Fifth Circuit discuss the nexus between the lawsuit and the forum chosen by Petitioner. The nexus consists of extensive solicitation of Petitioner in Houston, Texas, by agents and representatives of

> Lloyd's. The nexus further consists of what has been earlier described as the primary contract, the entire contractual undertaking whereby Petitioner became a Lloyd's underwriting member. Practically all items or component parts of this contractual undertaking occurred in, or were executed in, Houston, Texas.

The failure to analyze and evaluate these circumstances relevant to Petitioner's choice of forum violates this Honorable Court's mandate. The process and procedure utilized by both the Trial and Appellate Court are in opposition to this Honorable Court's opinions and holdings on the matter as well as the holdings and decisions of other circuits.

B.

THE ABANDONMENT OF 'PROTECTIVE CONDITIONS' IN CASE OF DISMISSAL TO A FOREIGN COURT

Petitioner's lawsuit was dismissed with prejudice by the District Court without the imposition of "protective conditions" which are usually involved when a District Court has determined that a foreign land, far away from an American citizen, is a more "appropriate forum." The affirmance of this dismissal in the manner undertaken by the Fifth Circuit is in clear conflict with the usual practice of that Circuit and others. The customary practice of the Fifth Circuit is to reverse and remand a District Court's outright dismissal so as to require and ensure the inclusion of appropriate conditions to protect the dismissed plaintiffs. *See Vaz Borralho* v. *Keydril,* 696 F.2d 379, 394-95 (Former 5th Cir. 1983), and *Diaz* v. *Humboldt,* 722 F.2d 1216, 1219 (5th Cir. 1984). As late as 1987, the Fifth Circuit observed, in its opinion *In re Air Crash Disaster,* 821 F.2d 1147, 1156 (5th Cir. 1987) (*en banc*), *vacated sub.nom., Pan Am World Airways, Inc.* v. *Lopez,* 490 U.S. , 109 S. Ct. 1928 (1989) *aff'd in part and vacated in part,* 883 F.2d 17 (5th Cir. 1989) that "only an outright dismissal with prejudice, could be more 'outcome — determinative' than a conditional dismissal to a distant forum in a foreign land."

With respect to the failure of the Fifth Circuit to reverse and remand for inclusion of protective orders, the Fifth Circuit is also in conflict with the practice in other circuits. *See Robertson, Forum Non Conveniens In America and England: "A Rather Fantastic Fiction"*, 103 L.Q.REV. 398, 408-409 (1987).

In spite of the clear cut practice of other circuits and in spite of its own practice, the Fifth Circuit here simply affirmed the District Court's dismissal with prejudice. This failure by both the District Court and Fifth Circuit deserves consideration in view of the uncertainties of litigation in a foreign land. Ironically, the Fifth Circuit relies on *Forsythe* v. *Saudi Arabian Airlines*, 885 F.2d 285 (5th Cir. 1989), in which an American citizen was remitted to Saudi Arabia. The Fifth Circuit in that case vacated and remanded to the District Court as follows:

> . . . we believe that the Court should have requested certain minimal stipulations from the defendant to protect Forsythe's opportunity to seek relief in the Saudi Arabian forum.
>
> Therefore, we VACATE the judgment dismissing Forsythe's lawsuit with prejudice and REMAND for entry of a judgment of dismissal without prejudice conditioned on Saudi's agreement to submit to the jurisdiction of the Courts of Saudi Arabia and to waive any defense of limitation.

Petitioner's lawsuit, it will be recalled, was dismissed with prejudice by the District Court. The Fifth Circuit simply affirmed that action.

C.

ABANDONMENT OF ESTABLISHED CONCEPTS OF DETERMINING AND REVIEWING FORUM NON CONVENIENS DISMISSALS

The decision by the Fifth Circuit Court of Appeals, requires this Honorable Court's examination. Its danger lies in the fact that this has been accomplished by several impermissible techniques employed by the Fifth Circuit:

1. Permitting too much discretion of the Trial Court by failing to take that Court to task for abandoning the concept of

deference to a Plaintiff's choice of forum and for permitting as justifiable the District Court's selective reading and interpretation of the record. In fact, whatever factual circumstances do not support the dismissal oriented weighing process have simply been ignored.

2. Permitting too much discretion in formulating an opinion around the same dismissal oriented circumstances without consideration of the proper scope of appellate review.

For example, in the Appellate Court's discussion of "private interest" factors, the Court listed the issue of enforceability of any resulting judgment. The Court went on to state:

> The district court did not consider whether any judgment obtained by Hirsch would be enforceable in Texas as opposed to England where the defendants reside.

Instead of evaluating the failure of the District Judge in this respect, the Fifth Circuit passes judgment on the argument made by Petitioner on this matter.

With respect to the issue of the "local interest" factor, both District Court and Fifth Circuit are totally oblivious to the "local interest" aspect of an American citizen's plight of the type that befell Petitioner.

For example, nowhere is there even the slightest attempt or pretext of attempt to evaluate any convenience-related factors and circumstances as a result of Plaintiff being a resident American citizen. Further, there is no discussion or analysis of the real possibility of anti-American bias to Plaintiff from the vantage point of a foreign forum.

The concept of deference to a plaintiff's choice of forum, particularly when that plaintiff is an American born resident citizen suing in his own right to protect himself from foreign misconduct occurring in his home town, has never been eliminated or even circumscribed as a most crucial aspect of the application of the test related to a claim of forum non conveniens.

III.

THE FIFTH CIRCUIT'S FORUM NON CONVENIENS ANALYSIS AND APPLICATION IN AN "AMERICAN PLAINTIFF V. FOREIGN DEFENDANT" CASE RAISE IMPORTANT AND UNRESOLVED PROBLEMS WHEN THE ALTERNATIVE FORUM IS A FOREIGN COURT.

Since the adoption of the doctrine of forum non conveniens by the federal judiciary, no case in which an American citizen residing in the United States who sued a foreign defendant in his own right, when the alternative forum was a foreign court, has ever been accepted for review by this Court. Because no cases from this particular group have ever been granted review in this Court, great uncertainty exists as to a variety of matters in this area of the law as applicable to "American Plaintiff v. Foreign Defendant" cases when the only alternative forum is a foreign court.

THE PROBLEM OF WEIGHING DEFERENCE TO PLAINTIFF'S CHOICE OF FORUM

The seminal case of *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 67 S. Ct. 839 (1947), was a domestic forum non conveniens controversy involving the choice between United States District Courts in New York or Virginia, two sister states. *Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235, 102 S. Ct. 252 (1981), involves the situation of a foreign Plaintiff seeking to benefit from an American Court's application of American law.

In cases involving American Plaintiffs suing in their own right, the approach of the indefeasible right to litigate at home has clearly been abandoned. However, the pronouncements in *Piper Aircraft Co.* clearly leave unanswered how much deference the Trial Court must give and extend to the American Plaintiff's choice of forum. In short, how much more suitable must the foreign forum be before dismissal of an American claimant's suit is appropriate? Also the criteria for determining suitability are

unclear. This Court stated in *Piper Aircraft Co.*, 414 U.S. at 255 n.23:

> A [U.S.] citizen's forum choice should not be given dispositive weight . . . Citizens or residents deserve somewhat more deference than foreign plaintiffs, but . . . if the balance of convenience suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.

The confusion among the circuits as to the weighing process is evident. For example, significant uncertainty pervades the Fifth Circuit. The Fifth Circuit required a showing of a material injustice before permitting a Trial Court to exercise its discretion to "deny a citizen access to the courts of this country". *Burt* v. *Isthmus Development Co.*, 218 F.2d 353 (5th Cir. 1955). However, in *Pacific Employers Insurance Co.* v. *M/V Capt. W.D. Cargill*, 751 F.2d 801 (5th Cir. 1985), the Fifth Circuit reevaluated *Burt* in the light of *Piper Aircraft Co.* v. *Reyno, supra*, and derived the following meaning from *Piper Aircraft Co.*:

> "Thus, despite Pacific's argument that as a United States citizen its choice of a home forum is entitled to greater deference by a United States Court than a foreigner's choice, a United States Court in a forum non conveniens case is not required to make its determination on that factor alone, nor would it have abused its discretion in not heavily weighing that factor."

Thereafter, the Fifth Circuit again had occasion to express and apply its view of the kind of "weighing" involved in an American citizen's choice of American forum in a suit involving basically foreign defendants where the alternative forum was a foreign land. In *Schexnider* v. *McDermott International, Inc.*, 817 F.2d 1159 (5th Cir. 1987), with full view of the *Piper Aircraft Co.* wording on deference to choice of forum by an American citizen and by a foreigner, the Fifth Circuit stated at 1163:

> . . . it is also true that there is ordinarily a strong presumption in favor of the Plaintiff's choice of forum that may be overcome only when the private and public interest factors clearly point toward trial in the alternative forum . . .

and at 1164:

> Because the factors pointing against the strong presumption in favor of the Plaintiff's choice of forum in this case are slight, we conclude that the district court abused its discretion by dismissing Schexnider's suit.

Consequently, both post-*Piper Aircraft* decisions from the Fifth Circuit can only be reconciled on the point of deference to Plaintiff's choice of forum with a measuring stick which says: (1) a Plaintiff's choice of forum is to be invested with a strong presumption and great deference is due a Plaintiff's choice; (2) it is not an abuse of discretion if a Plaintiff's choice of forum is not heavily weighted.

Consequently, when these views are applied into the instant case, what does the Fifth Circuit mean when it observes:

> The district court explicitly recognized that plaintiff's choice of forum is accorded substantial weight . . . (Fifth Circuit opinion, p.5).

With the confusion or uncertainty pervading the Fifth Circuit, other circuits, such as the Eighth Circuit raise more questions on the issue of how much deference is to be accorded an American resident citizen in view of *Piper Aircraft*.

The Eighth Circuit in *Lehman* v. *Humphrey Cayman, Ltd.*, 713 F.2d 339 (5th Cir. 1983) *Cert. Den.*, 464 U.S. 1042 (1984), has interpreted *Piper Aircraft* as equating, in the analysis for forum non conveniens, "Plaintiff's residence" with "significant concern" to be considered by the Trial Court. Nevertheless, the Eighth Circuit still appears to be following the principle that "Plaintiff's choice of forum should rarely be disturbed." And even though the Fifth Circuit has re-evaluated *Burt* v. *Isthmus Development Co.* in the light of *Piper Aircraft*, so as to deprive it of much of its fervor in deference to the Plaintiff's choice of forum, the Eighth Circuit is not reluctant to refer to the *Burt* case in the post-*Piper Aircraft* decisions. It should be noted that this Honorable Court denied a Writ of Certiorari with respect to the Eighth Circuit's opinion in *Lehman* v. *Humphrey Cayman, Ltd.*, supra.

In summation, the prevailing uncertainty as considered in the group of cases involving American resident citizens suing a foreign defendant in an American court in connection with claims arising in the United States, raises the following questions:

> Has *Piper Aircraft* left intact the strong deference to an American plaintiff's choice of forum in the United States Courts that prevailed prior to *Piper* or has there been an "weakening" or "dilution" of that concept of deference?
>
> If there has been a "weakening" or "dilution," does that only apply to foreign plaintiffs suing in United States Courts?
>
> If the "dilution" or "weakening" applies only to foreign plaintiffs, what is the current applicable standard of deference to plaintiff's choice of forum for the American plaintiff who is a resident citizen suing a foreign defendant in his own right on the basis of significant transactions occurring in the plaintiff's chosen forum?

Consequently, in the weighing process to accommodate the appropriate deference to Plaintiff's choice of forum, only indecision has emerged and only confusion can result.

CONCLUSION

This request for Supreme Court intervention involves the preservation of the principle of deference to a plaintiff's choice of forum as enunciated in this Honorable Court's decisions and the preservation of the proper scope of appellate review as mandated in *Piper Aircraft*.

As to the concept of deference, the District Court stated the concept and thus proceeded to state the reasons why London, England, was a more appropriate forum for Petitioner who is suing in his own right, is a born, and resident American citizen whose primary transaction with Lloyd's and his underwriting agent, Oakeley Vaughan Underwriting Limited occurred in Houston, Texas, and not in London, England. The District Court never even discussed any advantages or disadvantages regarding the Petitioner's choice of forum. That aspect of the forum non conveniens analysis was never even mentioned.

The Fifth Circuit failed to be governed by the limited scope of review as mandated by Piper Aircraft, never discussed or evaluated Petitioner's choice of forum and affirmed, thereby violating the holdings and practice in forum non conveniens even in other Fifth Circuit cases.

The District Court and the Fifth Circuit have violated the applicable concepts pronounced by this Honorable Court with respect to the doctrine of forum non conveniens. In a period when more and more American resident citizens, such as Petitioner, become investors as a result of solicitation and entanglement occurring in the United States, foreign defendants should not have the benefit of improper application of the doctrine of forum non conveniens to force American citizens into foreign courts to seek redress for misconduct occurring in the local forum. For these reasons this Petition for Certiorari should be granted.

Respectfully submitted,

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August 29, 1990

No. 89-2563

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAY D. HIRSCH,

Plaintiff-Appellant,

versus

OAKELEY VAUGHAN UNDERWRITING LIMITED, *et al,*

Defendants-Appellees.

**APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(CA H 87 3727)**

(May 31, 1990)

Before CLARK, Chief Judge, THORNBERRY and JONES, Circuit Judges. EDITH H. JONES, Circuit Judge:[1]

Appellant Jay Hirsch applied to become and was elected an underwriting member of the Society of Lloyds, London on December 31, 1980. As an underwriting member, or "Name," Hirsch was required to enter into an underwriting agency agreement through which he participated in syndicates which issue policies and contracts of insurance. Hirsch chose to participate in several Lloyds syndicates that were managed by the Oakeley Vaughan and St. George defendants. When the Oakeley Vaughan syndicates sustained losses so large that they could not be covered out of available income, the Corporation of Lloyds, which is the staffing arm of the Society of Lloyds, at the request

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expenses on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

of Oakeley Vaughan, made a "cash call" upon Hirsch and other syndicate members. Hirsch refused to pay. Instead, he filed suit in Texas state court against entities associated with Lloyds and Oakeley Vaughan and the St. George defendants. He alleged claims founded on fraud, negligence, breaches of fiduciary duty and contract, conspiracy, and Texas statutory violations. He asserted that Lloyds knew or should have known of mismanagement within the Oakeley Vaughan syndicates at the time he joined them. The state court granted a temporary injunction preventing Allied Bank (now First Interstate) from honoring a letter of credit obtained by Hirsch in favor of the Corporation of Lloyds. In October 1987, the Lloyds defendants removed the case to federal court, where all defendants moved to dismiss for lack of personal jurisdiction and forum non conveniens. The district court agreed that Texas is not a convenient forum for litigating the parties' claims, and it accordingly dismissed.[2]

On appeal, we are asked by the appellees to determine whether Hirsch preserved his right to argue against the forum non conveniens decision and whether there is jurisdiction over the Oakeley Vaughan defendants. Hirsch contests the sufficiency of the district court's findings, the merits of its decision, and the court's refusal to permit more discovery before it decided to dismiss. We shall consider each of these arguments in turn.

Although we agree with the appellees' criticism that Hirsch briefed the issue of forum non conveniens in the most perfunctory manner, it is clear that he did not waive or concede that issue in the district court. His brief in response to Oakeley Vaughan's Motion for Stay Pending Arbitration and Motion for Dismissal for Forum Non Conveniens specifically denied that the latter option was available to the district court on the facts or law of the case. Apparently, Hirsch thought that many of the arguments against forum non conveniens effectively overlapped with those concerning personal jurisdiction, the issue he briefed at length. In any

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[2] The court dissolved the injunction against First Interstate; Hirsch has not appealed this decision.

event, the district court addressed the issue on its merits without making reference to Hirsch's waiver, and we likewise reach the merits.

Next, Oakeley Vaughan defendants suggest that before addressing the issue of forum non conveniens, we must find that the district court had jurisdiction over the defendants. In *Gulf Oil Corp.* v. *Gilbert,* the Supreme Court stated that " . . . the doctrine of forum non conveniens an never apply if there is absence of jurisdiction or mistake of venue." *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 504, 67 S.Ct. 839, 841 (1947). This statement reflects a truism rather than a rule enunciating the priority in which a federal court must address the issues before it. Our court must affirm the district court's dismissal either if we agree that Texas was an inconvenient forum or if the district court had no jurisdiction over the defendants. If the former issue is clearer legally and factually, we see no reason to engage in discussion of the latter issue. Additionally, there is precedent in our court for avoiding thorny jurisdictional issues in favor of affirming a district court's dismissal for forum non conveniens. Syndicate 420 at *Lloyds London* v. *Early American Insurance Co.,* 796 F.2d 821, 826 and 831 (5th Cir. 1986). See also, *Texas Employers' Ins. Ass'n.* v. *Jackson,* 862 F.2d 491, 497 n.8 (5th Cir. 1988) *(en banc), cert. denied,* 109 S.Ct. 1932 (1989). Accordingly, we will pretermit any discussion of the district court's personal jurisdiction over the defendants.

We arrive next at the issue of forum non conveniens. Hirsch acknowledges that we may only overturn the district court's dismissal upon a showing of abuse of discretion. Syndicate 420, 796 F.2d at 827-28. The parties are agreed that the doctrine permits a dismissal only after the district court has balanced public and private interest factors related to "the ultimate inquiry . . . where trial will best serve the convenience of the parties and the ends of justice." *Koster* v. *Lumbermen's Mutual Cas. Co.,* 330 U.S. 518, 527, 67 S.Ct. 828, 833 (1947). This court has previously held that a district court considering a motion to

dismiss for forum non conveniens is required first to determine if an adequate alternative forum exists to entertain the case, and then to weigh the public and private interest factors to determine whether the balance favors dismissal. *In re: Aircrash Disaster Near New Orleans*, 821 F.2d 1147, 1165-66 (5th Cir. 1987) *(en banc)*, vacated and remanded on other grounds sub non *Pan Am World Airways, Inc.* v. *Lopez*, ... U.S. ....., 109 S.Ct. 1928 (1989). Here, however, apart from asserting the superiority of a Texas forum to hear his lawsuit, Hirsch did not contest the adequacy of the English court. In fact, other plaintiffs are pursuing similar claims against the appellees in England right now.

The factors bearing on the "private interest" of the litigants before the court include the accessibility of proof and witnesses; the enforceability of any resulting judgment; the ease and expense of litigation in the forum; and other relative advantages and obstacles to a fair trial. The "public interest" factors include the local interest in having a local controversy decided at home; the burden imposed upon jurors within the forum; and the necessity of applying foreign law and possibility of conflicts of law. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. at 508-09, 67 S.Ct. at 843; *Kempe* v. *Offshore Drilling & Exploration Co.*, 876 F.2d 1138 (5th Cir. 1989); *Forsythe* v. *Saudi Arabian Airlines*, 885 F.2d 285 (5th Cir. 1989).

The district court succinctly identified and applied those private and public factors as to which there might be any dispute. The district court explicitly recognized that "plaintiff's choice of forum is accorded substantial weight and the burden is on the defendants to establish that the balance of convenience of the parties and witnesses strongly favors dismissal." Memorandum opinion at 4, citing *Piper Aircraft* v. *Reyno*, 454 U.S. 235, 102 S.Ct. 252 (1981). We shall briefly discuss each of the pertinent factors and the district court's handling of each.

The district court noted that as to the convenience of the parties and the anticipated witnesses, except for plaintiff and First

Interstate Bank, which was only tangentially involved because of the letter of credit, all other defendants and witnesses are English citizens. In this court, Hirsch takes the position that he would call other American witnesses and that some English witnesses have already testified by deposition. Whether he so informed the district court does not appear of record. The district court properly found, however, that Hirsch's contract with Lloyds was executed in London and designated to be performed in England and that Hirsch traveled to England for purposes of his transaction. Insofar as Hirsch attacks the method by which Lloyds oversaw the performance of underwriting agents such as Oakeley Vaughan, the documentation and witnesses must be in England. The logistical scale tips strongly toward England.

The district court did not consider whether any judgment obtained by Hirsch would be enforceable in Texas as opposed to England where the defendants reside. Hirsch's argument in this court that he could enforce a Texas judgment against the defendants is totally conclusory and highly dubious. Hirsch is most persuasive in suggesting that his interest in revoking his letter of credit could be recognized in Texas. However, that possibility became moot when the district court entered its unappealed order dissolving the injunction which restrained First Interstate Bank from making payment on the letter of credit. Significantly, Hirsch does not contend that he could not enforce any judgment against the English defendants in England.

As for the remaining "private interest" factors, Hirsch contends that he would be severely disadvantaged by being forced to litigate against these defendants in England. We disagree. The district court observed that approximately 40 of Hirsch's fellow underwriting members, including United States citizens, are presently pursuing a lawsuit in the High Court of Justice in London against these defendants. Hirsch has not shown that he is unable to join that lawsuit or to commence his own lawsuit in England. Although Hirsch resists the finding that he will not suffer undue prejudice by being remitted to the English courts, we have previously upheld a forum non conveniens dismissal against

similar claims by an American plaintiff. *See, e.g., Forsythe, supra.*

With respect to the "public interest" factors, the district court concluded that English statutory laws would be applied and that English courts have a significant "local interest" in resolving the disputes internal to the operation of Lloyds. Despite Hirsch's insistence that his claims are governed by Texas law, we agree with the district court's decision to the contrary. This lawsuit aims at the heart of the unique self-regulatory mechanism within Lloyds, which is a product of complex English legislation. Further, unlike the plaintiff in *Kempe* v. *Ocean Drilling & Exploration Co.*, 876 F.2d 1138 (5th Cir. 1989), Hirsch has not asserted that English law deprives him of any remedies or imposes additional burdens upon his claims apart from possibly depriving him of a jury trial. Even if that were the case, it does not necessarily defeat a forum non conveniens dismissal. *See Kempe,* 876 F.2d at 1145.

Hirsch has failed to point out any significant errors of fact or law that cast doubt on the propriety of the district court's dismissal. Under these circumstances, we cannot find an abuse of discretion.

There remains Hirsch's contention that the district court deprived him of an opportunity to secure proof necessary to contest dismissal for forum non conveniens. Ironically, Hirsch contends that he was "prepared to take these depositions in Texas, New York, London, or wherever else could have been agreed upon . . .". This statement undercuts his alleged inability to pursue litigation abroad. Be that as it may, Hirsch never suggested in the district court that he needed this discovery for purposes of disputing the forum non conveniens issue, and we decline to consider this belated contention. As the Supreme Court noted in *Piper Aircraft,* "[r]equiring extensive investigation would defeat the purpose of [the] motion." 454 U.S. at 258.

For the above-stated reasons, we *AFFIRM* the judgment of the district court.

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAY D. HIRSCH,
Plaintiff

vs.

OAKELEY VAUGHAN, *et al*,
Defendants

CIVIL ACTION
NO. H-87-3727

ORDER

Pending before the Court are Defendants' motions to dismiss pursuant to Rule 12(b) and forum non conveniens as well as the motion of First Interstate Bank to dissolve the temporary injunction.

Summary of Facts

This is a diversity suit. The Plaintiff has alleged breaches of contract and fiduciary duty, tortious acts, and statutory violations of Texas consumer and insurance laws. The dispute arises out of a contract executed in London in November, 1980, effective January 1, 1981, between Plaintiff and Oakeley Vaughan Underwriting Ltd. It appears that the initial contact between Plaintiff, an experienced attorney, and the Defendants was through Mr. Wilfred Sherman, the Plaintiff's English cousin, who is not a named Defendant.

Plaintiff agreed to invest in his capacity as a "member" or "name" at Lloyds. This agreement further stipulated that the Plaintiff's role was passive and he would not be permitted to actively participate in any insurance-related activity. As an investor in the several syndicates, he risked sharing a proportion-

ate amount of underwriting gains or losses. During the years 1981, 1982, and 1983, the syndicates experienced losses. The Plaintiff has refused to pay his share and has obtained a temporary injunction preventing First Interstate Bank from honoring a letter of credit, requested by the Plaintiff, in favor of the Corporation of Lloyds.

Initially, the Plaintiff filed this suit in the 281st Judicial District Court of Harris County, Texas. It was later removed to this Court by the Defendants.

Now pending before the Court are motions to dismiss filed by the following Defendants: Oakeley Vaughan Underwriting Ltd.; Charles A. B. St. George; James St. George; Mark E. P. St. George; Edward St. George; Oakeley Vaughan and Company, Ltd.; The Corporation of Lloyds; The Council of Lloyd's; and The Society of Lloyd's. Also pending is First Interstate Bank's motion to dissolve the temporary injunction.

Jurisdiction and Forum Non Conveniens

The Defendants' motions to dismiss are based upon lack of *in personam* jurisdiction pursuant to Rule 12(b) and *forum non conveniens,* as codified in 28 U.S.C. § 1404(2). The Plaintiff bears the burden of proof to establish that the Defendants had "minimum contacts" with Texas sufficient to allow the Court to exercise personal jurisdiction over the foreign Defendants. *International Shoe Co.* v. *State of Washington,* 326 U.S. 310, 316 (1945). The Court recognizes that the very nature of the business in which the Defendants are engaged represents a world wide presence of operations. Therefore, it is necessary to determine whether this Court has jurisdiction over the non-resident Defendants. *Zac Smith & Co.* v. *Otis Elevator Co.,* 734 S.W.2d 662, 664 (Tex. 1987).

Although there is evidence that a representative of Oakeley Vaughan and Company, Ltd. met the Plaintiff in Houston, Texas for one day to discuss a matter unrelated to this case, and there were communications both by mail and telephone, the Court is

unable to find substantial contacts with this Defendant sufficient to establish *in personam* jurisdiction. While there may be some question as to whether this Court can dismiss all the Defendants due to a lack of personal jurisdiction there is no question the doctrine of *forum non conveniens* applies to all the Defendants in this case.

When considering a dismissal based on *forum non conveniens,* the Court must first determine if an alternative forum exists, and if so, "balance and consider both the private interests and public interests at stake in the choice of forum." *Cowan* v. *Ford Motor Co.,* 713 F.2d 100, 103 (5th Cir. 1983). In this case, London, England is an alternative forum. The District Court has wide discretion in determining whether that forum is more appropriate based on the convenience of the parties and the interest of justice. *Weber* v. *Coney,* 642 F.2d 91 (5th Cir. 1981).

A primary consideration in determining whether to dismiss a case for *forum non conveniens* is where the relevant events took place. In this case, the contract was executed in England and the place of performance was designated as England. It is undisputed that the Plaintiff traveled to England for the purposes of this transaction.

As to the convenience of the parties and the anticipated witnesses, it appears that, with the exception of the Plaintiff and First Interstate Bank, who is only involved in the ancillary matter of the letter of credit, all other Defendants and witnesses are English citizens. However, Plaintiff's choice of forum is accorded substantial weight and the burden is on the Defendants to establish that the balance of convenience of the parties and witnesses strongly favors dismissal. Nonetheless, a finding that trial in Plaintiff's chosen forum would be burdensome is sufficient to support a dismissal based on *forum non conveniens. Piper Aircraft* v. *Reyno,* 454 U.S. 235, rehearing denied, 455 U.S. 928 (1981).

There are additional factors in this case which weigh in favor of dismissal based upon *forum non conveniens.* The choice of law would dictate that English statutory laws be applied. In addition, since the Lloyd's market is regulated by the United Kingdom, there is significant local interest in the English courts to resolve the issues in dispute. Also, an identical proceeding is pending in the high court of justice in London, brought by approximately forty of Plaintiff's fellow underwriting members, including United States citizens, against these Defendants. Plaintiff may join this suit or bring a similar one in England.

Texas Cause of Action

Plaintiff has also alleged violations of Texas' Deceptive Trade Practices Act and the Texas Insurance Code. Because Plaintiff's participation in The English syndicate was solely as an investor, the transaction complained of does not involve the transaction of the business of insurance as defined, and is therefore exempt. V.A.T.S. Insurance Code, art. 1.14-1 Sec. 2 and art. 18.23.

The Court finds that the cause of action based on the Texas Deceptive Trade Practices Act is unfounded and therefore need not be reached.

Arbitration

Defendant Oakeley Vaughan Underwriting, Ltd. has filed a motion urging that the arbitration clause in the contract be enforced. Although this Court is of the opinion it is valid, a final determination must be made by the English Court.

Letter of Credit

Coutts & Co., a foreign corresponding bank, who has refused to recognize the jurisdiction of this Court, has made a presentment upon the letter of credit in the amount of 61,243.30 pounds sterling (approximately $110,911.62 U.S.) and debited the account of First Interstate Bank.

By complying with its contracts with Coutts & Co. and the Plaintiff, First Interstate Bank is in the position of bearing the loss pending resolution of this lawsuit. If the Plaintiff prevails, the bank is without an adequate remedy unless it submits to the jurisdiction of the English courts. If the Defendants prevail, the bank is entitled to recover from the Plaintiff. This Court will not impose upon the Defendant bank that which the Plaintiff maintains it is unwilling to do, that is, seek redress in the English courts. Therefore, the Court finds that the temporary injunction should be dissolved.

Conclusion

Based on the totality of the circumstances, Defendants have met their burden and dismissal of this case is justified on the basis of *forum non conveniens*. The balance of convenience strongly favors the Defendants and justice will best be served by dismissing this action because this Court lacks personal jurisdiction over some or all of the Defendants, most of the parties reside in England, the events giving rise to the action occurred in England, the choice of law is English, and an identical proceeding is pending in England which the Plaintiff may join, resulting in more effective litigation. Therefore, it is

ORDERED that Defendants' motions to dismiss this case is GRANTED. It is further

ORDERED that Defendant First Interstate Bank's motion to dissolve the temporary injunction is GRANTED.

IT IS SO ORDERED.

Done at Houston, Texas, this 14th day of December, 1988.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAY D. HIRSCH,
Plaintiff

vs.

OAKELEY VAUGHAN, *et al,*
Defendants

CIVIL ACTION
NO. H-87-3727

FINAL JUDGMENT

The Court having granted Defendants' motions to dismiss, this case is DISMISSED with prejudice.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 14th day of December, 1988.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAY D. HIRSCH,
Plaintiff
vs.
OAKELEY VAUGHAN, *et al*,
Defendants

CIVIL ACTION
NO. H-87-3727

ORDER

Based on Plaintiffs' motion to reconsider or, in the alternative motion to alter or amend judgment the Court has reconsidered its order of December 16, 1988. Dismissal was based on the common law doctrine of *forum non conveniens* not 28 U.S.C. § 1404(a). The reference to 28 U.S.C. § 1404 should be disregarded in the one sentence in which it appears.

After reconsideration of the remainder of the order the Court is still of the opinion that based on the totality of the circumstances of *forum non conveniens.*

Signed this 12th day of April, 1989 at Houston, Texas.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

Supreme Court, U.S.
FILED
OCT 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAY D. HIRSCH,

Petitioner,

– against –

OAKELEY VAUGHAN UNDERWRITING LIMITED, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERQUESTION PRESENTED

Should this Court review a case dismissed on the ground of *forum non conveniens* where the facts found below amply support the dismissal and petitioner's only claim is that an American plaintiff may *never* be deprived of his right to sue a foreign defendant in an American forum?

STATEMENT PURSUANT TO RULE 29.1

Respondents the Society of Lloyd's and the Corporation of Lloyd's have no parent or subsidiary corporations within the meaning of Rule 29.1 of the Rules of the Supreme Court of the United States.

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No. 90-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAY D. HIRSCH,

Petitioner,

– against –

OAKELEY VAUGHAN UNDERWRITING LIMITED, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents the Society of Lloyd's, the Council of Lloyd's and the Corporation of Lloyd's ("Lloyd's" or the "Lloyd's Respondents") respectfully ask that this Court deny Mr. Hirsch's petition for a writ of *certiorari* that seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit, *Hirsch v. Oakeley Vaughan Underwriting Limited et al.*, May 31, 1990, No. 89-2563 (unpublished slip opinion). A-1-6.[1],[2]

[1] Refers to the Appendix to the *Petition for Writ of Certiorari.*

[2] Respondents Oakeley Vaughan and Company Limited, Charles A. B. St. George, Mark E. P. St. George, Edward St. George and James St. George have

(Footnote continued)

PRELIMINARY STATEMENT

If ever there was a case in which it was appropriate to send an American plaintiff's claims to England on *forum non conveniens* grounds, it is this case.[3] Petitioner Hirsch has conceded as much; he has not really challenged the decisions of the courts below on the ground that they misapplied existing law. Rather, he asks this Court to enunciate a rule that an American plaintiff's choice of an American forum may never be denied when the defendant is foreign.

In the trial court, Mr. Hirsch litigated and briefed the issue of personal jurisdiction over the Lloyd's respondents at length, but he did not utter a single word of opposition to Lloyd's motion to dismiss on *forum non conveniens* grounds. The trial court, perceiving that the issue of jurisdiction was factually complex and hotly disputed, turned to the *forum non conveniens* motions, where the facts were undisputed and pointed without exception to England as the most convenient forum. England provides an alternate forum and, in fact, other similarly situated Americans are suing Lloyd's in England; all of the pertinent witnesses and documents are there; Mr. Hirsch's claims against Lloyd's are governed by English law; and England has a strong interest in the outcome of the dispute, since it involves regulatory and disciplinary control over the insurance market at Lloyd's. In Texas, there is only Mr. Hirsch.

Apparently unable to distinguish between jurisdiction and *forum non conveniens*, Mr. Hirsch continued to urge, before the Court of Appeals, that he had been solicited in Texas to become a Member at Lloyd's and had signed some of his agreements

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reviewed and agreed with the position taken by Lloyd's on the issues presented by the Petitioner and therefore join in this response without filing separate briefs in opposition.

[3] The Court of Appeals for the Fifth Circuit did not even publish its opinion, finding, pursuant to Local Rule 47.5, that the case raised no important new issue but was "merely decide[d]. . .on the basis of well-settled principles of law." A-1 n.1.

with Lloyd's in Texas. On these grounds, he alleged that his choice of a Texas forum should not be denied, despite the overwhelming evidence that the public and private factors pertinent to *forum non conveniens* pointed entirely to the English forum.

The Court of Appeals agreed with Judge Black below, holding that "[t]he logistical scale tips strongly toward England." A-5. It emphasized that "[t]his lawsuit aims at the heart of the unique self-regulatory mechanism within Lloyd's, which is a product of complex English legislation." A-6.

Petitioner Hirsch now comes to this Court to argue, in essence, that his status as an American citizen should have been sufficient to overcome all of the undisputed convenience factors found by the courts below to point to England. In an effort to create a novel issue, he alleges that this Court has thus far neglected to set forth specific rules for the exact calculation of the "substantial deference" that is due an American plaintiff's choice of forum.

The Lloyd's Respondents submit that this Court has given ample guidance as to the principles that should inform the weighing of an American plaintiff's choice of forum on a case-by-case basis. And even if this Court were interested in expanding its guidance on the subject, clearly this is not the case in which to do so.

COUNTERSTATEMENT OF FACTS

Petitioner Hirsch has presented this Court with some 11 pages of facts. Virtually all of these facts pertain to the contacts between Mr. Hirsch and Lloyd's that led him to become a Member of Lloyd's – the initial solicitation in Texas made by Mr. Wilfred Sherman and others, the issuance by a Texas bank of a letter of credit provided to Lloyd's to secure Mr. Hirsch's liabilities as an Underwriter, and the signing in Texas of certain ancillary agreements between Mr. Hirsch and Lloyd's.* Whether Mr.

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* Refutation of the specific allegations in Mr. Hirsch's petition (Pet. 2-9) is not necessary to the *forum non conveniens* analysis; Lloyd's does not, however,

(Footnote continued)

Sherman acted for Lloyd's, or for the Oakeley Vaughan parties, or simply for himself (in hopes of a commission from Oakeley Vaughan), was hotly disputed below. It was this agency question, pertinent to the issue of personal jurisdiction, that the courts below saw no need to resolve. Instead, even after assuming Mr. Hirsch's version is the correct one, the courts below found that these contacts with the Texas forum were not relevant to the *forum non conveniens* issue.

The facts that are relevant are those surrounding Mr. Hirsch's claims against Lloyd's. In essence, he claims that the Society, Council and Corporation of Lloyd's were negligent in the performance of the regulatory and disciplinary duties imposed on them under the Lloyd's Acts 1871-1982.[5] Mr. Hirsch believes that Lloyd's knew, when it admitted him to membership, that the Oakeley Vaughan syndicates he proposed to invest in were in violation of the rules of Lloyd's and were in financial difficulties. There are issues between Mr. Hirsch and Lloyd's as to the extent of Lloyd's knowledge of such irregularities, the status of an investigation into them at the time Mr. Hirsch became a Member of Lloyd's, and the exact nature of Lloyd's obligations, if any, to disclose whatever information it had to Mr. Hirsch. From the date of his membership forward, there arise issues as to whether Lloyd's acted with sufficient promptness in discovering and then dealing with alleged irregularities in the conduct of the Oakeley Vaughan Syndicates. (*See, e.g.*, Pet. 6, 8-9; *see also* the "Points of Claim" in a pending English lawsuit by 39 other Lloyd's Members who were on the same syndicates for the same years as Mr. Hirsch, and who make similar claims. The Points of Claim are printed in the appendix to this brief.) Clearly, as the courts below found, all of the witnesses and documents pertinent to these claims are located in England.

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agree with these allegations, nor did the courts below make findings of fact that support them.

[5] *See Plaintiff's First Amended Original Petition*, included as an appendix to this brief.

Lloyd's is a 300-year-old institution, a market composed of individual investors banded together into syndicates to underwrite risks. Their liability is unlimited and several. Syndicates are formed and operated by Underwriting Agencies, which, through often-related Members' Agents, solicit prospective Members so as to increase the assets that secure their underwriting, hence the amount of business they can do. *See generally Edinburgh Assur. Co. v. R.L. Burns Corp.*, 479 F. Supp. 138, 144-45 (C.D. Cal. 1979), *aff'd in part and rev'd in part on other grounds*, 609 F.2d 1259 (9th Cir. 1982).

The Society of Lloyd's, governed by the Council of Lloyd's and assisted by the Corporation of Lloyd's, which is the Society's staffing arm, oversees this market of individuals underwriting risks. It makes rules or bylaws for its Members and enforces these, backed by disciplinary powers. Lloyd's is defined, structured and governed by the Lloyd's Acts 1871-1982, which give the Society's obligations to its Members and its self-regulatory powers the status of English law. *In re Insurance Antitrust Litigation*, 723 F.Supp. 464, 488 (N.D. Cal. 1989).

The Society, Council and Corporation of Lloyd's do no insurance business anywhere, and have no assets in the United States. Consequently, as the Court of Appeals explicitly found — and Mr. Hirsch does not now dispute — no judgment entered against the Lloyd's Respondents in a United States court could be enforced here. As the Court of Appeals put it, Mr. Hirsch's argument before that court that such a judgment could be enforced here is "totally conclusory and highly dubious." A-5. Mr. Hirsch has not even urged that argument to this Court.

It is these facts — witnesses and documents entirely in England, undisputed applicability of English law, English interest in the governance of the market at Lloyd's, and the unenforceability of a Texas judgment — that are pertinent to dismissal of Mr. Hirsch's claims under the doctrine of *forum non conveniens*.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE COURTS BELOW WERE CLEARLY CORRECT IN FINDING THAT MR. HIRSCH'S CLAIMS AGAINST THE LLOYD'S RESPONDENTS, SOUNDING IN ENGLISH LAW AND REQUIRING ALMOST EXCLUSIVELY ENGLISH TESTIMONY, BELONG IN AN ENGLISH FORUM.

The proper factors to be considered in any *forum non conveniens* analysis are well known. First, there must be an available and adequate alternative forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981). Second, factors of public and private interest must be considered. Factors pertaining to the private interests of the litigants include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). "Factors of public interest" (*id.*) include "the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the avoidance of unnecessary problems in conflict of laws or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n. 6 (1981), *quoting Gilbert*, 330 U.S. at 509.

The Fifth Circuit's opinion followed applicable precedent to a tee. The court first found that England is an available alternative forum, as evidenced by the fact that "many of Hirsch's fellow underwriting members, including United States citizens, are presently pursuing a lawsuit in the High Court of Justice in London against these defendants." A-5. Neither here nor below has Mr. Hirsch "shown that he is unable to join that lawsuit or to commence his own lawsuit in England." *Id.* Mr. Hirsch's only response here is to complain of the "possibility of

anti-American bias" in an English forum (Pet. 23), a scurrilous and totally unsupported allegation.[6]

Next, the Fifth Circuit considered the "private interest" factors. It noted the district court's finding that all defendants (other than a bank involved only as a stakeholder) and all witnesses are English. Like the district court, the Fifth Circuit was skeptical that Mr. Hirsch, whose "contract with Lloyd's was executed in London and designated to be performed in England and [who] traveled to England for purposes of his transaction" would be seriously inconvenienced by trial in London. A-5, A-9-10.

The Fifth Circuit found that "(i)nsofar as Hirsch attacks the method by which Lloyd's oversaw the performance of underwriting agents such as Oakeley Vaughan, the documentation and witnesses must be in England." A-5. Mr. Hirsch does not challenge that finding, which the record amply supports. Allegations against the Lloyd's Respondents implicate the structure, organization and governance of Lloyd's. They charge the Lloyd's Respondents with failing to carry out duties required of them by Act of Parliament. If the case is to be tried in Texas, it will be necessary to have extensive testimony not only about Lloyd's but about complex questions of English law. It will also be necessary to have testimony as to who knew what at what point in time about Lloyd's investigation of Oakeley Vaughan, and whether documents such as the Chester Report could or should

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[6] Mr. Hirsch's argument that the courts below erred by not imposing "protective conditions" (Pet. 21-22) cannot stand as a challenge to availability of an English forum. Typically, the "conditions" imposed on a *forum non conveniens* dismissal are simply that defendants consent to suit in the alternative forum and waive any statute of limitations defenses that may have arisen since the commencement of plaintiff's action. Because Mr. Hirsch has never asked either the district or circuit court to impose any such conditions, those courts' failure to do so can hardly be termed error. In any event, the Lloyd's Respondents hereby stipulate, on the record, their amenability to suit in England and their waiver of any limitations defense that may have arisen since the commencement of this lawsuit, provided that Mr. Hirsch brings his English action within a reasonable period of time after his petition for *certiorari* is denied.

have been disclosed to Mr. Hirsch under English law. None of the persons likely to give testimony in these areas is resident in Texas, or even in the United States; they can all be found in England.

Mr. Hirsch cannot, and does not, seriously dispute the circuit court's conclusion that "(t)he logistical scale tips strongly toward England." A-5.

Discussion of the public interest factors is entirely absent from the *Petition for Writ of Certiorari*. This is not surprising, for in no sense can this case be described as a "local" dispute in Texas. It is centered entirely in England, and should not be inflicted on Texas courts and juries.

The district court's conclusion that England has a greater interest than Texas in this litigation was amply supported by its finding that "since the Lloyd's market is regulated by the United Kingdom, there is significant local interest in the English courts to resolve the issues in dispute." A-10. The record is undisputed that the Lloyd's Respondents' existence is chartered, and their conduct guided, by Acts of Parliament, and that the government of England has a vital interest in regulating the unique insurance marketplace that is Lloyd's.

The need to apply foreign law favors dismissal. *Piper*, 454 U.S. at 235 ("As we stated in *Gilbert*, the public interest factors point toward dismissal where the court would be required to 'untangle problems in conflict of laws, and in law foreign to itself.' "). The Fifth Circuit agreed with the district court that petitioner's lawsuit is governed by English law.[7] A-6. Both courts were

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[7] At several points in his petition, Mr. Hirsch appears to argue that the Fifth Circuit erred by supposedly reviewing the district court's decision *de novo* rather than applying an abuse of discretion standard. Pet. 13-15, 19, 23. That is just not so. *See* A-3 (Fifth Circuit states that it could "only overturn the district court's dismissal upon a showing of abuse of discretion"); A-4 ("The district court succinctly identified and applied those private and public factors as to which there might be any dispute").

(Footnote continued)

correct. As the Fifth Circuit found, and petitioner does not dispute, "(t)his lawsuit aims at the heart of the unique self-regulatory mechanism within Lloyd's, which is a product of complex English legislation." A-6. The application of the Lloyd's Acts to the complicated allegations set forth in Mr. Hirsch's complaint is a task that should be left in the first instance to the English courts.

Moreover, allowing these kinds of claims to be litigated anywhere other than England would raise the substantial possibility that inconsistent and conflicting results will flow from courts around the world on a matter of central importance to England. Most Members of Lloyd's are British subjects, but Members can also be found in more than sixty other countries, not just the United States. A result other than dismissal here would leave open the possibility of suits around the globe challenging the internal operating procedures of Lloyd's and the Lloyd's Respondents, when Parliament has spoken on that subject and litigation is progressing in British courts. Furthermore, as the Fifth Circuit found, it is "highly dubious" that Mr. Hirsch would be able to enforce a Texas judgment. A-5. Avoidance of inconsistent results and conservation of judicial resources weigh strongly in favor of dismissal and make all the wiser the view of the courts below that litigation in England, either as part of the already ongoing litigation raising essentially the same claims as Mr. Hirsch raises, or in a separate proceeding, is the best course.

In sum, *all* of the private and public interest factors point toward dismissal, save one: the fact that petitioner is an American. In various guises, one argument is all petitioner

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In any event, if the appellate court did apply a more rigorous standard than necessary, that could only have benefited Mr. Hirsch, and is not a proper ground for *certiorari*.

Moreover, Mr. Hirsch appears to have abandoned any claim that Texas law applies to his suit. He advances no such argument in his petition, and must therefore be taken as having accepted the Fifth Circuit's view that his dispute with Lloyd's is governed by English law.

makes: the lower courts should not have dismissed his lawsuit because he is American. As demonstrated below, the Fifth Circuit's decision in this case is not only not novel, it is in harmony with decisions of this Court and of other circuits, and raises no issue worthy of this Court's consideration.

II. THE APPLICATION OF THE DOCTRINE OF *FORUM NON CONVENIENS* BY THE COURTS BELOW TO A CLAIM BY AN AMERICAN PLAINTIFF AGAINST ENGLISH DEFENDANTS WAS BASED ON SETTLED LAW AND IS IN HARMONY WITH DECISIONS OF OTHER CIRCUITS.

Mr. Hirsch argues that the lower courts gave insufficient deference to his choice of forum and to his status as an American. He is wrong. Both the district court and the Fifth Circuit gave due consideration to Mr. Hirsch's citizenship and choice of forum, but found this single factor overwhelmingly outweighed by factors favoring dismissal.

Because Mr. Hirsch does not seriously challenge the findings of the courts below with respect to any of the other factors in the *forum non conveniens* analysis, this case does not present the theoretical question of how much deference an American plaintiff's choice of forum deserves. Here, because all other factors point toward dismissal, petitioner could succeed only if his choice of forum were entitled to absolute deference.

If accepted, Mr. Hirsch's argument would mean that no U.S. citizen's complaint could ever be dismissed on *forum non conveniens* grounds. While Mr. Hirsch is technically correct that this Court has never decided a case on all fours with his (Pet. 24), this Court (and many others) has squarely rejected his argument.

Both the district court (A-9) and the Fifth Circuit (A-4) recognized that while a plaintiff's choice of forum should be accorded substantial weight, that choice is not dispositive. That was squarely in accordance with this Court's teaching. As this

Court recognized in *Piper*, while a foreign plaintiff's choice of forum deserves less weight than a citizen's choice,

> [a] citizen's forum choice should not be given dispositive weight, however. Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.

454 U.S. at 256 n. 23 (citations omitted).

As this Court recently reemphasized, the "list of considerations to be balanced [in a *forum non conveniens* analysis] is by no means exhaustive, and some factors may not be relevant in the context of a particular case." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528-29 (1988). "[T]he district court is accorded substantial flexibility in evaluating a *forum non conveniens* motion [citation omitted], and 'each case turns on its facts.' " *Id.* at 529, quoting *Williams v. Green Bay & Western R. Co.*, 326 U.S. 549, 557 (1946). Any attempt to spell out in advance the precise amount of deference due a plaintiff's choice of forum in all cases would thus be a futile endeavor.

However, courts no longer accord "talismanic significance to the citizenship or residence of the parties." *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 154 (2d Cir. 1980) (en banc). This is hardly the first circuit court opinion upholding dismissal of a citizen's complaint on *forum non conveniens* grounds. *See, e.g. Forsythe v. Saudi Arabian Airlines*, 885 F.2d 285 (5th Cir. 1989); *Pacific Employers Ins. Co. v. M/V Capt. W. D. Cargill*, 751 F.2d 801 (5th Cir.), *cert. denied*, 474 U.S. 909 (1985); *Overseas Nat'l Airways v. Cargolux Airlines Int'l, S.A.*, 712 F.2d 11 (2d Cir. 1983); *Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983); *Nalls v. Rolls-Royce Ltd.*, 702 F.2d 255 (D.C. Cir.), *cert. denied*, 461

U.S. 970 (1983); *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981); *Calavo Growers of California v. Belgium*, 632 F.2d 963 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981); *Alcoa Steamship Co., supra.*

Contrary to Mr. Hirsch's argument (Pet. 25), there is no "confusion among the circuits as to the weighing process" in a *forum non conveniens* analysis. Each case, as this Court has said time and again, turns on its own facts. In each case, "the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice." *Koster v. Lumbermans Mutual Cas. Co.*, 330 U.S. 518, 527 (1946). "[A] real showing of convenience by a plaintiff who has sued in his home forum" is entitled to deference (*id.* at 524) but is not dispositive (*Piper*, 454 U.S. at 256 n. 23). In each case, the court must consider whether plaintiff has made "a real showing of convenience," but should dismiss "if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court." *Id.*

The cases Mr. Hirsch relies on (Pet. 25-26) raise no conflict among the circuits; they simply decide different cases differently based on their different facts. In *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984), plaintiff was financially unable to bring suit in the proposed alternative forum. 713 F.2d at 345-46. In reversing a *forum non conveniens* dismissal, the Eighth Circuit stressed that district courts faced with such motions "must be alert to the realities of the plaintiff's position, financial and otherwise, and his or her ability as a practical matter to bring suit in the alternative forum." *Id.* at 346. The Eighth Circuit's formulation is entirely consistent with the opinion of the court below. The practical realities of Mr. Hirsch's situation here are simply a far cry from the plight of the impoverished widow suing in *Lehman*.

Similarly, in *Schexnider v. McDermott Int'l, Inc.*, 817 F.2d 1159 (5th Cir.), *cert. denied*, 484 U.S. 977 (1987), the plaintiff made "a real showing of convenience." Many of plaintiff's witnesses were in this country; trial in the alternative forum

— Australia — "would in all likelihood be a hardship to [plaintiff] who is apparently not in good health;" and the defendants did not show that they would be inconvenienced by trial in plaintiff's chosen forum. 817 F.2d at 1163. Here, by contrast, Mr. Hirsch simply has not made "a real showing of convenience." Aside from his residence, petitioner does not identify any of the "convenience-related factors and circumstances" (Pet. 23) he claims the lower courts ignored — understandably, since there are none. Mr. Hirsch has no serious answer to the findings of the courts below that he would not be inconvenienced by trial in England. After all, it was to England that he traveled to affiliate himself with the venerable English institution of Lloyd's of London. In addition, all witnesses other than Mr. Hirsch are English; the Lloyd's Respondents will be seriously inconvenienced by trial in Texas; and all of the public interest factors, particularly England's interest in regulating the internal affairs of Lloyd's and the difficulties an American Court would encounter in obtaining authoritative English interpretations of the Lloyd's Acts, militate in favor of an English forum.

Finally, Mr. Hirsch raises numerous small points that can be dealt with summarily. His claim that the lower courts were unaware of his American citizenship (Pet. 20) is ludicrous. *See, e.g.*, A-4-5, A-9 (noting that all material parties, and all witnesses *other than plaintiff* are English). Mr. Hirsch's argument about the supposed "nexus" of his claim to Texas (Pet. 20) might be useful in establishing the minimum contacts necessary to support personal jurisdiction, but it entirely misses the point of the *forum non conveniens* analysis, which is directed to the locus of the relevant witnesses and evidence. Last, Mr. Hirsch argues, in essence, that the Fifth Circuit should have reversed because the district court did not discuss at great enough length the supposed benefits of his chosen forum. Pet. 15-20. In fact, however, it was *Mr. Hirsch* who briefed *forum non conveniens* to the district court only "in the most perfunctory manner" (A-2)[8] and

[8] Mr. Hirsch opposed the *forum non conveniens* motion made by Oakeley Vaughan and Company Limited but did not oppose the *forum non conveniens* motion made below by the Lloyd's respondents.

who failed to bring to that court's attention any factors that could possibly make trial in Texas "easy, expeditious and inexpensive." *Gilbert*, 330 U.S. at 508.

CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

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Counsel for Respondents
The Society of Lloyd's,
The Council of Lloyd's, and
The Corporation of Lloyd's

Dated: October 26, 1990

LLOYD'S RESPONDENTS' APPENDIX

IN THE HIGH COURT OF JUSTICE 1987 A No 3172

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

B E T W E E N:

PATRICIA ASHMORE

First Plaintiff

and

JOHN ATTRIDGE

Second Plaintiff

and

FRANCESCO BOSSI

Third Plaintiff

and

ETTORE BOTTA

Fourth Plaintiff

and

CHARLES CAVENAGH-MAINWARING

Fifth Plaintiff

and

JULIE CORMAN

Sixth Plaintiff

and

CHRISTOPHER CORNWALL-LEGH

Seventh Plaintiff

and

RICHARD CORNWALL-LEGH

Eighth Plaintiff

and

TONY COYLE

Ninth Plaintiff

and

NAT FENTON

Tenth Plaintiff

and

HAROLD FREEMAN

Eleventh Plaintiff

and

JEREMY GOOLD

Twelfth Plaintiff

and

JOHN GRIBBEN

Thirteenth Plaintiff

and

MICHAEL HACKER

Fourteenth Plaintiff

and

WILLIAM HACKER

Fifteenth Plaintiff

and

HERBERT HOOVER

Sixteenth Plaintiff

and

DONAL KINSELLA

Seventeenth Plaintiff

and

JEROME McHUGH

Eighteenth Plaintiff

and

WILLIAM MOSTYN-OWEN
Nineteenth Plaintiff

and

LIAM MULDOON
Twentieth Plaintiff

and

HOWARD O'BRIEN
Twenty-First Plaintiff

and

JOHN O'MAHONY
Twenty-Second Plaintiff

and

WILLIAM PIGGOT-BROWN
Twenty-Third Plaintiff

and

ANTHEA POWELL
Twenty-Fourth Plaintiff

and

THOMAS CARR POWELL
Twenty-Fifth Plaintiff

and

WINSTON WENDT PURVIS
Twenty-Sixth Plaintiff

and

REGIS REMILLARD
Twenty-Seventh Plaintiff

and

DENNIS JOHN SKINNER
Twenty-Eighth Plaintiff

and

ELIZABETH STONE
Twenty-Ninth Plaintiff

and

JAMES STONE
Thirtieth Plaintiff

and

MARGARET STONE DREWYER
Thirty-First Plaintiff

and

SUZANNE STONE
Thirty-Second Plaintiff

and

CHARLES THOMPSON
Thirty-Third Plaintiff

and

JOHN WATERHOUSE (JNR)
Thirty-Fourth Plaintiff

and

JOHN WATERHOUSE (SNR)
Thirty-Fifth Plaintiff

and

PETER WILKIE
Thirty-Sixth Plaintiff

and

VALERIE WILLES
Thirty-Seventh Plaintiff

and

MAXINE D'WINGFIELD
Thirty-Eighth Plaintiff

and

CHRISTOPHER WOOD
Thirty-Ninth Plaintiff

- AND -

THE CORPORATION OF LLOYD'S
Defendants

POINTS OF CLAIM

1. The Defendant ("Lloyd's") is a society and corporation incorporated by that name pursuant to the provisions of the Lloyd's Acts 1871 to 1951 and its By-Laws.

2. The objects of Lloyd's have at all material times been:

   "The carrying on by members of the Society of the business of insurance of every description including guarantee business;"

   The advancement and protection of the interests of members of the Society in connection with the business carried on by them as members of the Society and in respect of shipping and cargoes and freight and other insurable property or insurable interests or otherwise;

   The collection, publication and diffusion of intelligence and information;

   The doing of all things incidental or conducive to the "fulfillment of the objects of the Society."

   (See section 4 of the 1911 Lloyd's Act).

3. Prior to 1982 the Lloyd's Acts provided that there should be a committee of the members of Lloyd's and that committee was conferred with the management and superintendence of the affairs of Lloyd's.

4. The 1982 Lloyd's Act created the Council, and conferred on the Council the management and superintendence of the affairs of Lloyd's and the power to regulate and direct the business of insurance at Lloyd's.

5. The Plaintiffs were at various times material to these proceedings underwriting members of Lloyd's who are generally known as "Names" and are hereinafter referred to as such. Each of the Plaintiffs was a Name during one or more of the years 1980 to 1982.

6. At all material times, Names were required by Lloyd's to manage and conduct their insurance business at Lloyd's through syndicates and through the medium of underwriting agents approved on behalf of Lloyd's.

7. A syndicate at Lloyd's has always been a group of Names who have, directly or indirectly, delegated to an underwriting agent the power to manage and conduct their underwriting business at Lloyd's in relation to a particular class or classes of business.

8. Until the coming into force of the 1982 Act (or thereabouts) underwriting agents were persons approved by the Committee to act as such at Lloyd's; since that time, they have been persons permitted by the Council to act as aforesaid.

9. At all material times, the delegation of the power to an underwriting agent could have been effected as follows:

   Either -

   (a) the underwriting agent for a Name might himself manage and conduct the underwriting business of the syndicate or syndicates to which that Name (known as a "direct Name") belonged; or

   (b) such underwriting agent, acting in the role of a "member's agent", might arrange for such Name membership of a syndicate or syndicates, the underwriting business of which was managed or conducted by some other underwriting agent and the member's agent would, by means

of a sub-agency agreement, confer on such other underwriting agent power to manage and conduct the insurance business of that Name (known as an "indirect Name") in relation to such syndicate or syndicates.

10. As a member of Lloyd's each of the Plaintiffs was a party to, and bound by, an agreement between himself and Lloyd's, the express terms of which were contained in a Form of Undertaking on Admission which they respectively signed prior to their admission as members of Lloyd's.

11. Pursuant to such express terms, each of the Plaintiffs undertook as follows:

(a) So long as he continued to be a Name, and thereafter until his underwriting business had been fully wound up, either to attend regularly in person at Lloyd's to carry on his own underwriting, or to appoint and maintain an agent having the right of admission to the room at Lloyd's to conduct his underwriting business on his behalf; and

(b) That the amount of his premium income in any calendar year would not exceed the premium limit.

12. The observance of the premium income limit was, as Lloyd's well knew, a very important protection to the Names. Premium income limits are the only means by which the Names can do anything to limit the total amount of underwriting which they are prepared to undertake. If the premium income limits are exceeded, the potential losses to which Names are exposed will be increased.

13. It was a term of the relationship between the Plaintiffs and Lloyd's that the appointment of underwriting agents by the Plaintiffs would be by way of a full and complete delegation of all underwriting business by the Plaintiffs to their underwriting agent.

PARTICULARS

In support of this contention, the Plaintiffs will rely on the following provisions:

(a) Clauses 30 and 31 of the Form of Undertaking on Admission;

(b) The Underwriting Agents' Manual, section a, and

(c) The Notes for Applicants for Underwriting Membership in the Underwriting Agents' Manual.

14. It was further term of the relationship between the Plaintiffs and Lloyd's that they:

(a) should prepare or cause to be prepared underwriting accounts for submission to an annual audit in accordance with the requirements from time to time proscribed or approved by Lloyd's (clause 4).

(b) should at all times give to Lloyd's on request full and complete information as to any business at Lloyd's from time to time conducted on their respective behalves (clause 17).

15. Lloyd's were at all material times obliged to perform the specific duties pleased above by virtue of one or more of the following reasons.

(a) Lloyd's were subject to a statutory duty, pursuant to its Constitution, to each of the plaintiffs to perform such duties.

(b) Lloyd's owed to each of the Plaintiffs a duty of care at common law so to exercise its powers under its Constitution that the interests of the Plaintiffs, as members of Lloyd's, would be adequately protected.

(c) It was an implied term of the membership agreement made with each of the Plaintiffs or, in the alternative, of the general contractual relationship between Lloyd's and each of the Plaintiffs, that Lloyd's would perform the said specific duties.

16. It was Lloyd's duty to each of the Plaintiffs to:

(a) act in accordance with, and enforce, the provisions of its Constitution;

(b) exercise reasonable care, in making and enforcing bye-laws or otherwise, to ensure that the business of the insurance market at Lloyd's was conducted, supervised and regulated in an honest, competent and proper manner;

(c) exercise reasonable supervision over all agreements and arrangements entered into in accordance with the membership agreement or any relevant bye-laws made by Lloyd's;

(d) notify the Plaintiffs of any matter which came to the attention of Lloyd's, which merited or called for investigation by the Plaintiffs for better protection of their interests;

(e) intervene to protect the Plaintiffs against any conduct which was calculated to prejudice their interests as Names.

17. It was further Lloyd's duty to each of the Plaintiffs to approve, or allow to function, only such underwriting agents as possessed sufficient knowledge, experience and integrity to manage and conduct the affairs of the Plaintiffs in a proper and competent manner.

18. It was further Lloyd's duty to each of the Plaintiffs to regulate and control the general manner in which

underwriting agents conducted their, and the Plaintiffs', business at Lloyd's.

19. It was further Lloyd's duty to each of the Plaintiffs to ensure that the Plaintiffs' underwriting agents duly complied with the requirements of Lloyd's and that the Plaintiffs:

    (a) should keep their premium income within the premium income limit;

    (b) should submit appropriate accounts for annual audit;

    (c) should give Lloyd's full and complete information as to their underwriting business when required to do so;

20. Further, the Plaintiffs will contend that Lloyd's owed the said specific duties to each of them for the following reasons:

    (a) Since each of the Plaintiffs elected not to attend in person at Lloyd's, but to appoint and maintain an underwriting agent to conduct their underwriting business on their behalf, the Plaintiffs were, as Lloyd's well knew, precluded by the express requirements of the membership agreement, and by contract with the underwriting agents, from intervening in the conduct of the business;

    (b) Accordingly, the Plaintiffs were entitled to rely, and did rely, upon Lloyd's to exercise appropriate and satisfactory supervision of the market so as adequately to safeguard and protect their interests.

21. Pursuant to the undertaking contained in the membership agreement each of the Plaintiffs elected to appoint an underwriting agent to conduct their underwriting business at Lloyd's.

22. Each such appointment was contained in a written agreement. Full particulars will be given in due course and will set out the following details:

    (a) The name of each of the Plaintiffs;

    (b) The syndicate(s) to which he belonged in any relevant year of account;

(c) The date of such agreement;

(d) The name of the underwriting agent;

(e) In the case of indirect Names among the Plaintiffs, the date of the relevant sub-agency agreement.

Oakeley Vaughan (Underwriters) Limited ("Oakeley Vaughan")

23. At all material times Oakeley Vaughan was authorized or permitted by the Committee, and subsequently by the Council, to act as an underwriting agent on behalf of names.

24. Accordingly, at all material times Oakeley Vaughan managed and conducted the underwriting business of Names (including the Plaintiffs) who were from time to time members of Syndicates Nos. 420, 551 and 862, through active underwriters employed by it.

Oakeley Vaughan so acted under:

(a) Agency agreements made between Oakeley Vaughan and the Names directly (including some of the Plaintiffs); and

(b) Sub-agency agreements made between Oakeley Vaughan and members' agents for other Names (including some of the Plaintiffs), such members' agents entering into such arrangements pursuant to the terms of the agency agreement between each such Name and the members' agent.

Full Particulars of these matter will be served in due course.

Overwriting by Oakeley Vaughan

25. Oakeley Vaughan exceeded the premium income limits for the Names participating in Syndicates 420, 551 and 862 managed by it in the year 1980.

PARTICULARS

(a) Syndicate 420:

Premium written for 1980 year of account at 36 months:	£3,917,775
Syndicate capacity for 1980 year of account	£3,000,000
Overwritten	£ 917,775

(b) Syndicate 551:

Premium written for 1980 year of account at 36 months:	£3,986,302
Syndicates capacity for 1980 year of account	£3,060,000
Overwritten	£ 926,302

(c) Syndicate 862:

Premium written for 1980 year of account at 36 months:	£2,494,809
Syndicate capacity for 1980 year of account	£1,780,000
Overwritten	£ 714,809

26. At about the end of 1980 or during the 1981 Lloyd's commissioned an inquiry by Mr. Henry Chester into the degree of overwriting by Oakeley Vaughan and/or into its management and subsequently received a report ("the Chester Report") following the said inquiry.

27. Lloyd's did not contemporaneously (or subsequently) reveal the existence of the said inquiry or the Chester Report or its findings to the Names.

28. The Chester Report (and a supplemental report) delivered in about mid-1981 revealed or ought to have revealed:

(a) the extent of overwriting by Oakeley Vaughan;

(b) that Oakeley Vaughan had failed to adhere to established procedures in the conduct of business at Lloyd's as stated in a letter from Lloyd's to Oakeley Vaughan dated 4th December 1981;

(c) that Oakeley Vaughan possessed insufficient management control to ensure that premium income was kept within the premium income limits;

(d) that the management of Oakeley Vaughan was not sufficiently competent or prudent to conduct the affairs of Names in a proper and competent manner.

Lloyd's has persistently refused to disclose the Chester Report or its findings to the Plaintiffs. Further particulars of the findings of the Chester Report will be supplied after discovery herein and/or answers to Interrogatories.

29. Oakeley Vaughan continued to exceed the premium income limits for the Names participating in Syndicates 420, 551 and 862 in the years 1981 and 1982.

PARTICULARS

Syndicate 420

Premium written for 1981 year of account at 36 months:	£5,684,556
Syndicate capacity for 1981 year of account:	£3,803,000
Overwritten:	£1,881,556
Premium written for 1982 year of account at 36 months:	£9,417,073
Syndicate capacity for 1982 year of account:	£3,066,000
Overwritten:	£5,751,073

Syndicate 551

Premium written for 1981 year of account at 36 months:	£7,125,309
Syndicate capacity for 1981 year of account:	£4,610,000
Overwritten:	£2,515,309
Premium written for 1982 year of account:	£11,982,182
Syndicate capacity for 1982 year of account:	£4,985,000
Overwritten:	£7,015,000

Syndicate 862

Premium written for 1981 year of account at 36 months:	£2,934,485
Syndicate capacity for 1981 year of account:	£2,025,000
Overwritten:	£ 909,485
Premium written for 1982 year of account at 36 months:	£1,467,979
Syndicate capacity for 1982 year of account:	£1,415,000
Overwritten:	£ 52,979

30. In breach of its duty to the Plaintiffs as pleaded above, Lloyd's during the period between 1980 and 1982 failed to take any or any adequate steps to ensure that Oakeley Vaughan did not exceed the premium income limits and/or to ensure that the Plaintiffs received adequate information and accounts from their respective underwriting agents, in particular:

(a) Lloyd's laid down no adequate rule for ensuring that the net premium income of a Syndicate was not distorted by the deduction from the premium income of premiums in respect of reinsurance and failed to provide any adequate system for the enforcement of such rules as it had laid down for the purpose of preventing such distortion.

(b) Lloyd's laid down no adequate rules for ensuring that premium income limits were not exceeded and/or laid down no adequate procedures to check whether such limits were being exceeded at any material time.

31. Further, Lloyd's knew or ought to have known by mid-1981 (at the latest) that material irregularities had occurred and were being carried on by Oakeley Vaughan on behalf of Names in that:

(a) Premium income limits were being substantially abused;

(b) There were insufficient management controls within Oakeley Vaughan to ensure that premium income was kept within the premium income limit.

(c) The management of Oakeley Vaughan was not sufficiently competent or prudent to conduct the affairs of the Plaintiffs and other Names in a proper and competent manner.

32. The facts and matters referred to above were such as required Lloyd's to act so as to protect the Plaintiffs whether by:

(a) suspending Oakeley Vaughan;

(b) instructing Oakeley Vaughan to cease underwriting forthwith;

(c) informing the Plaintiffs directly of the facts and matter known to Lloyd's;

(d) investigating fully the circumstances in which Oakeley Vaughan's business was being conducted and informing the Plaintiffs of the result of such investigation;

(e) taking such further or action as would ensure that the Plaintiffs' interest were protected.

33. In breach of their duty Lloyd's failed to take any or any satisfactory steps to protect the Plaintiffs but wrongfully:

(a) permitted Oakeley Vaughan to continue underwriting;

(b) failed to inform the Plaintiffs of the facts of the Chester Inquiry and/or its findings and/or the steps to be taken consequent thereon; and/or

(c) failed to implement any or any satisfactory safeguards to ensure that Oakeley Vaughan, if permitted to continue underwriting, only wrote within premium income limits;

(d) failed to take any or any satisfactory steps to safeguard the interests of the Plaintiffs.

34. By reason of the said breaches of duty the Plaintiffs have suffered loss and damage.

PARTICULARS

(a) All losses in respect of contracts underwritten on their behalf by Oakeley Vaughan in 1980 and/or 1981 and/or 1982 and any subsequent years. Alternatively,

(b) Losses on all contracts underwritten by Oakeley Vaughan in excess of premium income limits in 1980 and/or 1981 and/or 1982.

35. The Plaintiffs further claim interest pursuant to section 35A of the Supreme Court Act 1981 on all such charges.

AND THE PLAINTIFF CLAIM:

(1) Damages for breach of statutory duty and/or contract and/or a common law duty of care.

(2) A declaration that Lloyd's is bound to indemnify them, and each of them, against the damages and losses respectively suffered by them by reason of the matters pleaded.

(3) Interest pursuant to section 35A of the Supreme Court Act, 1981.

MARK HOWARD

Served this day of 1987 by Elborne Mitchell of Three Quays, Tower Hill, London EC3, Solicitors to the Plaintiffs.

CAUSE NUMBER 86-40329

JAY D. HIRSCH	§	IN THE DISTRICT
	§	COURT OF
VS.	§	
	§	
OAKELEY VAUGHAN UNDER-	§	
WRITING LIMITED, CHARLES	§	
A. B. ST. GEORGE, JAMES C.	§	
B. ST. GEORGE, MARK E. P.	§	
ST. GEORGE, EDWARD ST.	§	HARRIS COUNTY,
GEORGE, OAKELEY	§	TEXAS
VAUGHAN AND COMPANY	§	
LIMITED, THE CORPORA-	§	
TION OF LLOYD'S, THE	§	
COUNCIL OF LLOYD'S, THE	§	
SOCIETY OF LLOYD'S,	§	
COUTTS & COMPANY, and	§	281ST JUDICIAL
ALLIED BANK OF TEXAS	§	DISTRICT

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION AND APPLICATION FOR TEMPORARY INJUNCTION AND PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW JAY D. HIRSCH, Plaintiff herein, complaining of OAKELEY VAUGHAN UNDERWRITING LIMITED, CHARLES A. B. ST. GEORGE, JAMES C. B. ST. GEORGE, MARK E. P. ST. GEORGE, EDWARD ST. GEORGE, OAKELEY VAUGHAN AND COMPANY LIMITED, THE CORPORATION OF LLOYD'S, THE COUNCIL OF LLOYD'S, THE SOCIETY OF LLOYD'S, COUTTS & COMPANY, and ALLIED BANK OF TEXAS as Defendants and for cause thereof would show unto the Court as follows:

I.

The Plaintiff, JAY D. HIRSCH, is an individual who resides in Houston, Harris County, Texas.

Defendant OAKELEY VAUGHAN UNDERWRITING LIMITED is a foreign corporation, or other form of business entity existing under the laws of England, which has in the past and is presently doing business in the State of Texas, as that term is defined in Section 17.042 of the *Texas Civil Practices and Remedies Code*. This Defendant does not maintain a place of regular business in the State of Texas and has no designated agent on whom service of citation may be made in this cause. Accordingly, pursuant to Section 17.044(b) of the *Texas Civil Practices and Remedies Code*, OAKELEY VAUGHAN UNDERWRITING LIMITED has been previously duly served with citation on this cause and has specifically appeared through counsel pursuant to Rule 120a of the Texas Rules of Civil Procedure.

Defendant CHARLES A. B. ST. GEORGE, is a non-resident individual who has in the past and is presently doing business in the State of Texas, as that term is defined in Section 17.042 of the *Texas Civil Practice and Remedies Code*. This Defendant does not maintain a place of regular business in the State of Texas and has no designated agent or whom service of citation maybe made in this cause. Accordingly, pursuant to Section 17.044(b) of the *Texas Civil Practices and Remedies Code*, CHARLES A. B. ST. GEORGE has been previously duly served with citation in this cause and has specially appeared pursuant to Rule 120a of the Texas Rules of Civil Procedure.

Defendant, JAMES C. B. ST. GEORGE is a non-resident individual which has in the pasty and is presently doing business in the State of Texas, as that term is defined in Section 17.042 of the *Texas Civil Practices and Remedies Code*. This Defendant does not maintain a place of regular business in the State of Texas and has no designated agent whom service of citation may be made in this cause. Accordingly, pursuant to Section 17.044(b) of the *Texas Civil Practices and Remedies Code*, JAMES C. B. ST. GEORGE has been previously duly served with citation on this cause and has specially appeared pursuant to Rule 120a of the Texas Rules of Civil Procedure.

Defendant, MARK E. P. ST. GEORGE is a non-resident individual who has in the past and is presently doing business in

the State of Texas, as that term is defined in Section 17,042 of the *Texas Civil Practices and Remedies Code*. This Defendant does not maintain a place of regular business in the State of Texas and has no designated agent upon whom service of citation may be made in this cause. Accordingly, pursuant to Section 17.044(b) of the *Texas Civil Practices and Remedies Code*, MARK E. P. ST. GEORGE has been previously duly served with citation in this cause and has specially appeared through counsel pursuant to Rule 120a of the Texas Rules of Civil Procedure.

Defendant, EDWARD ST. GEORGE is a non-resident individual who has in the past and is presently doing business in the State of Texas, as that terms is defined in Section 17.042 of the *Texas Civil Practices and Remedies Code*. This Defendant does not maintain a place of regular business in the State of Texas and has no designated agent upon whom service of citation may be made in this cause. Accordingly, pursuant to Section 17.044(b) of the *Texas Civil Practices and Remedies Code*, EDWARD ST. GEORGE has been previously duly served with citation in this cause and has specially appeared through counsel pursuant to Rule 120a of the Texas Rules of Civil Procedure.

Defendant, OAKELEY VAUGHAN AND COMPANY LIMITED, is a foreign corporation or some other form of business entity which has in the past and is presently doing business in the State of Texas, as that term is defined in Section 17.042 of the *Texas Civil Practices and Remedies Code*. This Defendant does not maintain a place of regular business in the State of Texas and has no designated agent upon whom service of citation may be made in this cause. Accordingly, pursuant to Section 17.044(b) of the *Texas Civil Practices and Remedies Code*, OAKELEY VAUGHAN AND COMPANY LIMITED has been previously duly served with citation in this cause and has specially appeared through counsel pursuant to Rule 120a of the Texas Rules of Civil Procedure.

Defendant, THE CORPORATION OF LLOYD'S, is a foreign corporation or some other form of business entity which

has in the past and is presently doing business in the State of Texas, as that terms is defined in Section 17.042 of the *Texas Civil Practices and Remedies Code*. This Defendant does not maintain a place of regular business in the State of Texas and has no designated agent upon whom service of citation may be made in this cause. Accordingly, pursuant to Section 17.044(b) of the *Texas Civil Practices and Remedies Code*, THE CORPORATION OF LLOYD'S has been previously duly served with citation in this cause and has specially appeared through counsel pursuant to Rule120a of the Texas Rules of Civil Procedure.

Defendant, THE COUNCIL OF LLOYD'S, is a foreign corporation or some other form of business entity which has in the past and is presently doing business in the State of Texas, as that terms is defined in Section 17.042 of the *Texas Civil Practices and Remedies Code*. This Defendant does not maintain a place of regular business in the State of Texas and has no designated agent upon whom service of citation may be made in this cause. Accordingly, pursuant to Section 17.044(b) of the *Texas Civil Practices and Remedies Code*, this Defendant may be served with citation herein by serving the Secretary of State of Texas who in turn shall forward process to Defendant's address by registered mail or by certified mail, return receipt requested. The name and address of said Defendant is THE COUNCIL OF LLOYD'S, located at Lloyd's, Lime Street, London EC3, England.

Defendant, THE SOCIETY OF LLOYD'S, is a foreign corporation or some other form of business entity which has in the past and is presently doing business in the State of Texas, as that term is defined in Section 17.042 of the *Texas Civil Practices and Remedies Code*. This Defendant does not maintain a place of regular business in the State of Texas and has no designated agent on whom service of citation may be made in this cause. Accordingly, pursuant to Section 17.044(b) of the *Texas Civil Practices and Remedies Code*, this Defendant may be served with citation herein by serving the Secretary of State of Texas who in turn shall forward process to Defendant's address by registered mail or by certified mail, return receipt

requested. The name and address of said Defendant is THE SOCIETY OF LLOYD'S, located at Lloyd's, Lime Street, London EC3, England.

Defendant, COUTTS & COMPANY, is a foreign corporation or some other form of business entity which has in the past and is presently doing business in the State of Texas, as that term is defined in Section 17.042 of the *Texas Civil Practices and Remedies Code*. This Defendant does not maintain a place of regular business in the State of Texas and has no designated agent upon whom service of citation may be made in this cause. Accordingly, pursuant to Section 17.044(b) of the *Texas Civil Practices and Remedies Code*, COUTTS & COMPANY has been previously duly served with citation in this cause but has failed to file answer herein. A courtesy copy of this Amended Petition has been mailed to this Defendant at Stonestreet House, 143 Cannon Street, London EC4N 5BJ, England.

Defendant, ALLIED BANK OF TEXAS, a banking corporation duly formed and existing under the laws of the State of Texas, has been served with citation through its registered agent and has made an appearance in this case through counsel.

II.

PIERCING THE CORPORATE VEIL/ALTER EGO

Plaintiff asserts that there is such unity among the Council of Lloyd's, The Corporation of Lloyd's and The Society of Lloyd's, that the separate existence of said Defendants, hereinafter collectively referred to as "LLOYD'S", has ceased and an adherence to the fiction of the separate existence of said Defendants would, under the circumstances described herein, sanction a fraud or promote injustice.

III.

1. On or about January 1, 1981, the Plaintiff, JAY D. HIRSCH was duly elected as an underwriting member of LLOYD'S. When elected, underwriting members are required to enter into an underwriting agency agreement with an underwriting agent in turn employs an underwriter to write business for

all members of a syndicate under which the underwriting members or names do business. On or about January 1, 1981 the Plaintiff, JAY D. HIRSCH, entered into underwriting agreements as a name with the Defendant, OAKELEY VAUGHAN UNDERWRITING LIMITED which provided among other things that OAKELEY VAUGHAN UNDERWRITING LIMITED would act as the underwriting agent for the name, JAY D. HIRSCH, for the purposes of underwriting at LLOYD'S for the account of the name, JAY D. HIRSCH, policies and contracts of insurance, reinsurance, and guarantee relating to all classes of insurance business which with the sanction of the committee of LLOYD'S may be transacted at LLOYD'S by the syndicate or syndicates which the name, JAY D. HIRSCH, is and was a member. A copy of the General Undertaking Agreement and other documents executed by JAY D. HIRSCH with LLOYD'S and/or the other Defendants, which provides for performance by the parties in whole or in part are attached hereto as Exhibit "B".

2. At all material times herein, the Plaintiff, JAY D. HIRSCH, is and was a member of syndicates 420, 551, and 862 for the years of the accounts in question. Said syndicates were under the sole and exclusive control of the Defendant, OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors, CHARLES A. B. ST. GEORGE, JAMES C. B. ST. GEORGE, MARK E. P. ST. GEORGE and EDWARD ST. GEORGE, Defendants herein. Defendants OAKELEY VAUGHAN UNDERWRITING LIMITED, and its directors, as underwriting agents or syndicates 420, 551 and 862 were fiduciaries of the names under said syndicates and had a duty to conduct and manage the underwriting affairs of said syndicates on behalf of its names in a reasonable and prudent manner and to comply fully with all the requirements and regulations of the Defendant, LLOYD'S, on behalf of the names for whom it acted. In underwriting for the accounts of its names, Defendant, OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors were required to underwrite the amount of premium income provided for by

the current regulations of LLOYD'S in relation to a names, means and deposit. As such, Defendant OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors were required to take reasonable steps to insure that the amount of insurance business underwritten in syndicates 420, 551, and 862 would not cause the syndicate premium allocable to a certain year of account to exceed the syndicate allocated capacity for that certain year of account. Defendants, OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors were further required to establish and maintain effective systems for monitoring the syndicate premium income and to keep the actual and forecast syndicate premium income allocable to every open year of account under active review at all times. Further, Defendants, OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors were required to protect the syndicates and accounts of its name through reasonable and prudent methods of reinsurance including but not limited to effecting appropriate excess of loss reinsurance, aggregate excess of loss reinsurance, or excess loss ratio reinsurance, in addition to arranging and procuring appropriate stop loss insurance for its particular names.

3. Plaintiff, JAY D. HIRSCH, would show that it with respect to syndicates 420, 551 and 862, the Defendants OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors had consistently overwritten and exceeded the premium income limits for the 1980 through 1983 years of account in violation of the requirements and regulations of the Defendant, LLOYD'S. In short, the management and directors of Defendant, OAKELEY VAUGHAN UNDERWRITING LIMITED failed to properly and adequately monitor, insure and require that the premiums of syndicates 420, 551 and 862 did not exceed the limits prescribed by the underwriting agency agreement and the LLOYD'S regulations and requirements. Furthermore, the management and directors of Defendant OAKELEY VAUGHAN UNDERWRITING LIMITED failed to properly protect their syndicates and accounts by appropriating proper reinsurance and stop loss insurance.

4. Plaintiff would show further that during the late 1980 or early 1981 the committee of LLOYD'S, Defendant, appointed Mr. Henry Chester to undertake an inquiry into the management and affairs of OAKELEY VAUGHAN UNDERWRITING LIMITED. This inquiry was the direct result of constant and flagrant overwriting violations which directly contravene the rules and regulations of LLOYD'S and give rise to the damages and losses in question. Plaintiff would show that such an inquiry into the competence of underwriting agents at LLOYD'S is of critical importance to the names, such as your Plaintiff, JAY D. HIRSCH, who subscribed through a members agency on syndicates managed by that agent. Plaintiff would show further that at no time was he ever informed of the fact giving rise to or the conclusions of the Chester inquiry, nor of the violations of the rules and regulations of LLOYD'S by the directors of OAKELEY VAUGHAN UNDERWRITING LIMITED. Moreover, the Defendant, LLOYD'S did not at any time material herein remove the management of the affairs of syndicates 420, 551 and 862 from Defendant, OAKELEY VAUGHAN UNDERWRITING LIMITED as has been done in similar circumstances. Plaintiff would show that the relationship between a LLOYD'S member, his agent, and LLOYD'S is a personal one based on trust and would show that had such matters concerning the overwriting practices of OAKELEY VAUGHAN UNDERWRITING LIMITED been disclosed by the directors of OAKELEY VAUGHAN UNDERWRITING LIMITED, OAKELEY VAUGHAN UNDERWRITING LIMITED, and LLOYD'S, your Plaintiff, JAY D. HIRSCH, would have never undertaken placement as a name on said syndicates which thereby resulted in the damages in question. Moreover, at no time did LLOYD'S ever inform your Plaintiff, JAY D. HIRSCH, of the Chester report and subsequently failed to properly monitor the management and affairs of OAKELEY VAUGHAN UNDERWRITING LIMITED to prevent said overwriting practices from continuing.

5. Plaintiff would show further that during 1979 syndicate 551 bought a reinsurance from the Fen-Re Intercommunity Re

Pool through the agency of the Defendant, OAKELEY VAUGHAN & COMPANY LIMITED. On or about December, 1981, considerable difficulty was being encountered in the market in obtaining recoveries from the Fen-Re. At that particular time the Fen-Re owed to syndicate 551 a very substantial sum. Defendant, OAKELEY VAUGHAN & COMPANY LIMITED paid to syndicate 551 a sum in excess of 250,000 pounds in early January, 1982, being credits due to the syndicate on its reinsurance claims against various reinsurers, including to the extent of 250,000 pounds Fen-Re, but which claims had not at that time been collected by OAKELEY VAUGHAN & COMPANY LIMITED from such reinsurers. By making such a payment OAKELEY VAUGHAN UNDERWRITING LIMITED represented to the names on whose behalf the reinsurance was placed that sums due thereunder were recoverable when they know or should have known that this was not true. Had your plaintiff, JAY D. HIRSCH known of the true state of the accounts for 1979 he would have taken steps to remove himself from the syndicate 551 thus preventing the losses and damages resulting by his remaining on that syndicate.

6. Plaintiff would further show that in its 1981 account, syndicate 551 underwrote a U.S. Fire Treaty as a reinsurance of the Insurance Corporation of Ireland. Substantial losses are now being claimed which greatly exceed the premium income allocated for this syndicate. With proper management, OAKELEY VAUGHAN UNDERWRITING LIMITED should have been aware of the fact that the original estimates were being exceeded and have undertaken the necessary steps to protect its names interest either by refusing to accept premium in excess of the estimate or requiring the Insurance Corporation of Ireland to obtain a reinsurance for premium accepted in excess of the original estimate. Moreover no attempt was made on the part of OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors to advise, disclose or obtain stop loss insurance in this regard.

7. As the result of the unlawful acts, conduct and practices on the part of the Defendants, OAKELEY UNDERWRITING

LIMITED, CHARLES A. B. ST. GEORGE, JAMES C. B. ST. GEORGE, MARK E. P. ST. GEORGE, EDWARD ST. GEORGE, AND OAKELEY VAUGHAN AND COMPANY LIMITED and LLOYD'S described above, your Plaintiff, as a name on syndicates 420, 551 and 862 has incurred substantial losses and is currently being asked to pay very substantial sums to meet the claims and losses which have been incurred in the 1981 through 1983 accounts. By virtue of the above named Defendants' mismanagement of the syndicates in question, said claims and losses have resulted in deficits in the syndicate accounts.

IV.

FIRST CAUSE OF ACTION

1. Your Plaintiff would show that this suit is being filed pursuant to the provisions of the Texas Business and Commerce Code Annotated Section 17.41, *et seq*. commonly known as the Deceptive Trade Practices and Consumer Protection Act and herein referred to as the D.T.P.A., on the grounds that the acts and practices described above are prohibited by this statute.

2. Plaintiff would further show this Honorable Court that all conditions precedent to the filing of said action have been performed.

3. At all times material herein your Plaintiff JAY D. HIRSCH was a "consumer" as defined by Section 17.45(4) of the D.T.P.A. and as such is entitled to maintain an action against the Defendants, OAKELEY VAUGHAN UNDERWRITING LIMITED, CHARLES A. B. ST. GEORGE, JAMES C. B. ST. GEORGE, MARK E. P. ST. GEORGE, EDWARD ST. GEORGE and OAKELEY VAUGHAN AND COMPANY LIMITED and LLOYD'S as a result of said Defendants' violations of certain provisions of the D.T.P.A.

4. Pursuant to said Act, your Plaintiff would show that the unlawful acts and practices described above constitute

a. All Defendants caused confusion or misunderstanding in the mind of JAY D. HIRSCH as to the affiliation, connection or association with or certification by LLOYD'S and the non-bank Defendants. Defendants caused JAY D. HIRSCH to believe that LLOYD'S and all other non-bank Defendants were so affiliated, and contracting with LLOYD'S and Oakeley Vaughan Underwriting Limited, JAY D. HIRSCH was also dealing with or contracting with LLOYD'S as an entity in and of itself consisting of The Counsel of Lloyd's, the Corporation of Lloyd's and The Society of Lloyd's, or that Lloyd's would see to it that all other non-bank Defendants fulfilled its promises and obligations pursuant to all contracts signed by HIRSCH with Defendants. Said contracts were performable in whole or in part in Texas.

b. representations that the services of the above named Defendants had sponsorship, approval, and characteristics, uses, or benefits, which they in fact do not have in violation of Section 17.46(b)(4);

c. representations that the services of the above named Defendants were of a particular standard, quality or grade when they were in fact of another in violation of Section 17.46(b)(4);

d. representations that the agreements in question conferred or involved rights, remedies or obligations which in fact it did not have in violation of Section 17.46(b)(12);

e. representations that the services of the above named Defendants have been performed when in facts such represented services were not performed in violation of Section 17.46(b)(21);

f. a failure to disclose information concerning the services and inquiries of said Defendants which was known at that time of the transaction, when such failure to disclose such information was intended to induce your Plaintiff, JAY D. HIRSCH, into a transaction into which he would not

a. have entered had the above described information and services been disclosed in violation of Section 17.46(b)(23);

g. breaches of express or implied warranties in violation of Section 17.50(a)(2);

h. unconscionable acts or causes of action on the part of the Defendants named above in violation of Section 17.50(a)(3).

5. Your Plaintiff would show that the unlawful acts and practices described above are and were a producing cause of the damages to your Plaintiff.

6. Your Plaintiff would further show this Honorable Court and Jury that with respect to Defendants' violations of the D.T.P.A. enumerated above, that said unlawful acts and practices were committed knowingly by said Defendants. Thus, pursuant to D.T.P.A. Section 17.50, the actual damages found by the trier of facts which do not exceed $1,000 shall be multiplied times three and awarded to the Plaintiff. Moreover Plaintiff would show further that pursuant to Section 17.50 of the D.T.P.S. that he be awarded an amount not to exceed three times that amount of the actual damages which exceeds $1,000.

V.

SECOND CAUSE OF ACTION

1. Your Plaintiff in the alternative, would show that this suit is likewise being filed pursuant to the provisions of Sections 4 and 16 of Article 21.21 of the Texas Insurance Code. As such your Plaintiff is entitled to maintain an action against the Defendants, OAKELEY VAUGHAN UNDERWRITING LIMITED, CHARLES A. B. ST. GEORGE, JAMES C. B. ST. GEORGE, MARK E. P. ST. GEORGE, EDWARD ST. GEORGE and OAKELEY VAUGHAN AND COMPANY LIMITED and LLOYD'S as the result of said Defendants violations of the provisions of Section 4 of Article 21.21 of the Texas Insurance Code.

2. Pursuant to said Act your Plaintiff would show that the unlawful acts and practices described above constitute unfair and deceptive acts or practices in the business of insurance in violation of Section 4 of Article 21.21 of the Texas Insurance Code and are and were producing cause of the damage to your Plaintiff.

3. Plaintiff would further show that pursuant to Section 16(b)(1), your Plaintiff is entitled to the trebling of all actual damages found by the trier of fact.

VI.

THIRD CAUSE OF ACTION

1. In the alternative, without waiving the same, your Plaintiff would further allege that the occurrence in question as well as the damages made the basis of this lawsuit was proximately and/or solely caused by the negligence and breaches of fiduciary duty, breach of a duty of good faith and breach of contract on the parts of the Defendants, OAKELEY VAUGHAN UNDERWRITING LIMITED, CHARLES A. B. ST. GEORGE, JAMES C. B. ST. GEORGE, MARK E. P. ST. GEORGE, EDWARD ST. GEORGE, OAKELEY VAUGHAN AND COMPANY LIMITED in one or more of the following respects:

   a. the overwriting by said Defendants of the syndicates' premium income for syndicates 420, 551 and 862;

   b. in failing to properly manage and monitor the affairs of the Plaintiff as a name of the syndicates in question as a reasonably prudent LLOYD'S underwriter would have done under the same or similar circumstances;

   c. in failing to properly protect the Plaintiff's syndicates and accounts by proper methods of reinsurance as a reasonably prudent LLOYD'S underwriter would have done under the same or similar circumstances;

d. in failing to procure appropriate stop-loss insurance to protect the interest of the Plaintiff, name, as a reasonably prudent LLOYD'S underwriter would have done under the same or similar circumstances;

e. in failing to disclose to the Plaintiff the facts giving rise to, or the facts of, or the conclusions of an inquiry by LLOYD'S into the affairs of OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors.

2. Plaintiff would further allege that by reason of the fact that the above named Defendants engaged in willful, malicious and wanton conduct and acted with a conscious indifference and disregard to the rights or welfare of your Plaintiff, JAY D. HIRSCH, you Plaintiff is allowed to recover exemplary damages as a result of the gross negligent conduct of said Defendant. In this connection your Plaintiff would request that exemplary damages be awarded against said Defendants in a sum which exceeds the minimum jurisdictional limits of this court.

VII.

FOURTH CAUSE OF ACTION

1. In the alternative without waiving the same, your Plaintiff would further allege that the occurrence made the basis of this lawsuit as well as the damages in question was proximately and/or solely caused by the negligence, breach of fiduciary duty, breach of a duty of good faith, and breach of contract on the part of the Defendant, LLOYD'S in one or more of the following respects:

a. failing to disclose to the Plaintiff the facts giving rise, the fact of, or the conclusions of the inquiry by LLOYD'S into the affairs of OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors;

b. in approving, selecting and allowing OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors to continue as the underwriting agent for your Plaintiff when the Defendant, LLOYD'S, knew or in the

a. exercise of reasonable care should have known that said underwriting agency had engaged in and continued to engage in violations of the practices, rules and regulations of LLOYD'S with respect to its overwriting practices.

c. in allowing, selecting, and approving, the Defendant, CHARLES A. B. ST. GEORGE, to continue as an executive director of the Defendant, OAKELEY VAUGHAN UNDERWRITING LIMITED;

d. in failing to monitor and regulate the overwriting practices of the Defendant OAKELEY VAUGHAN UNDERWRITING LIMITED;

2. Plaintiff would further allege that by reason of the fact that the Defendant, LLOYD'S engaged in willful, malicious, and wanton conduct and acted with a conscious indifference and disregard to the rights or welfare of your Plaintiff, your Plaintiff is allowed to recover exemplary damages as the result of the gross negligent conduct of said Defendant. In this connection Plaintiff would request that exemplary damages be warded against this Defendant in the sum which exceeds the minimum jurisdictional limits of this Court.

VIII.

FIFTH CAUSE OF ACTION

Plaintiff would further show, in the alternative, and without waiving the same, that the occurrence made the basis of this lawsuit as well as the damages in question were proximately and/or solely caused by the negligence, breach of duty, breach of duty of good faith, and breach of contract of the Defendant, OAKELEY VAUGHAN & COMPANY LIMITED by reason of the representation to your Plaintiff that reinsurance monies due and owing to members of syndicate 551 were recoverable from the intercommunity Re-Pool Fen-Re Agency by funding the sum of 250,000 pounds on or about January, 1982 thereby giving rise to the damages in question.

IX.

SIXTH CAUSE OF ACTION

1. In the alternative without waiving the same, your Plaintiff would further allege that the Defendants, OAKELEY VAUGHAN UNDERWRITING LIMITED, CHARLES A. B. ST. GEORGE, JAMES C. B. ST. GEORGE, MARK E. P. ST. GEORGE, EDWARD ST. GEORGE, and OAKELEY VAUGHAN AND COMPANY LIMITED, and LLOYD'S expressly and impliedly represented to your Plaintiff upon membership and election as a member of LLOYD'S that their services would be performed in a reasonable and worklike manner and would be performed pursuant to the rules, regulations, and standards promulgated by the insurance industry and LLOYD'S. Moreover, as fiduciaries to your Plaintiff, OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors expressly and impliedly represented and warranted to your Plaintiff that it would not engage in overwriting practices in contravention of the requirements, rules and regulations as set forth by LLOYD'S and that Defendants, OAKELEY VAUGHAN UNDERWRITING LIMITED, its directors, and LLOYD'S would make full disclosure to your Plaintiff of all facts giving rise to, the fact of, or the conclusions of any inquiry by LLOYD'S into the affairs of OAKELEY VAUGHAN UNDERWRITING LIMITED, and its directors which would be detrimental or in conflict with the interests of your Plaintiff as a name of the syndicates in question as well as an underwriting member of LLOYD'S. Furthermore, LLOYD'S represented and expressly and impliedly warranted that they would properly regulate the affairs of the Defendants, OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors and properly monitor the management of OAKELEY VAUGHAN UNDERWRITING LIMITED and its directors to insure that further violations of the rules, regulations, and requirements of LLOYD'S did not continue.

2. Your Plaintiff would further allege that each and every one of the representations set forth above concern material facts

for the reason that your Plaintiff would not have undertaken to subscribe to continue as a name on the syndicates in question nor continue in any type of relationship with OAKELEY VAUGHAN UNDERWRITING LIMITED, had your Plaintiff known about the falsity of said representations. Each and every one of said representations, both express and implied was relied upon by your Plaintiff to your Plaintiff's substantial injury and damage. In this connection, your Plaintiff would further allege that said Defendants purported to have and did have superior knowledge concerning the subject matter of the transactions and activities described above, and your Plaintiff justifiably relied upon said Defendants' superior knowledge. Plaintiff would further show that all of the representations both express and implied made by the Defendants referred to above were false and that when said Defendants made said representations, said Defendants either knew said representations were false or made the recklessly without any knowledge of the truth and made them as positive assertions. Your Plaintiff would further show that said representations were made with the intent of inducing your Plaintiff to enter the transactions referred to above. Thus relying upon the Defendants' false and misleading representations, your Plaintiff entered the transactions referred to above and would not have entered said transactions but for the Defendants' representations. By reason of your Plaintiff's reliance upon the representations described above your Plaintiff has received damages proximately caused by the fraud, deceit and misrepresentation on the part of said Defendants.

X.

1. Your Plaintiff would show that the unlawful acts and practices on the part of the Defendants described above are and were a producing and/or proximate cause of the damages to your Plaintiff. The purpose of this suit is to recover the amount of money which, if paid now in cash, would fairly and reasonably compensate your Plaintiff for such damages together with all punitive and exemplary damages assessed by a jury in this case. The amount of damages which should

be awarded to your Plaintiff as the result of the Defendants' unlawful acts and practices far above exceeds the minimal jurisdictional limits of the Court.

2. Plaintiff would further show that the undersigned attorney has been retained by the Plaintiff to pursue the causes of action alleged herein. Pursuant to the D.T.P.A., and the Texas Insurance Code all attorneys fees that are reasonable and necessary in this cause may be recovered by the Plaintiff. Moreover, based upon the Defendant's misrepresentations, unconscionable actions, breaches of contract and express and implied warranties, your Plaintiff is entitled to recover attorneys fees reasonable and necessary in this cause under Section 38.001 of the *Texas Civil Practices and Remedies Code*.

XI.

CIVIL CONSPIRACY

Defendants civilly conspired to either unlawfully conduct lawful acts, or to lawfully conduct the unlawful acts described within this Petition, including without limitation, defrauding JAY D. HIRSCH into becoming an underwriting member of LLOYD'S and the signing by JAY D. HIRSCH of the General Undertaking Agreement as well as other documents described herein and to be described throughout the discovery phase and trial of this cause.

Defendants are therefore jointly and severally liable to JAY D. HIRSCH for all actual damages proximately caused thereby, and all other charges and attorney's fees incurred by Plaintiff, plus pre-judgment and post-judgment interest thereon at the highest rate and for the periods prescribed by law. Defendants are additionally jointly and severally liable to Plaintiff for all exemplary damages found against each.

WHEREFORE, PREMISES CONSIDERED, the Plaintiff, JAY D. HIRSCH, prays that the Defendants OAKELEY VAUGHAN UNDERWRITING LIMITED, CHARLES A. B. ST, GEORGE, JAMES C. B. ST. GEORGE, MARK E. P. ST. GEORGE, EDWARD ST. GEORGE, OAKELEY VAUGHAN

AND COMPANY LIMITED, and LLOYD'S be cited according to law to appear and answer herein, and that after final trial your Plaintiff have judgment against the Defendants for those damages described above and in the full amount allowed by law, together with court costs, pre-judgment interest at the legal rate, post-judgment interest; and further prays for the exemplary damages requested as well as additional and treble damages pursuant to Section 17.50 of the D.T.P.A. and Section 21.21 of the Texas Insurance Code; and further prays for attorneys fees that are reasonable and necessary in this cause as set forth above and for costs of court.

XII.

As additional relief hereunder, and pursuant to common law and Article 17.50(b)(2) and (3) of the D.T.P.A., your Plaintiff seeks a temporary restraining order and pending a hearing thereon a temporary injunction, enjoining ALLIED BANK OF TEXAS from honoring any demands made by the Defendant, LLOYD'S as a beneficiary of a letter of credit number 7675, or its advising bank, Defendant COUTTS & COMPANY and that on a hearing thereof the Defendant ALLIED BANK OF TEXAS and/or Defendant COUTTS & COMPANY be enjoined from disbursing any such funds or any part thereof during the pendency of any claims made by your Plaintiff against the Defendants set forth above and until full and final disposition of said claims and further that upon final disposition hereof said letter of credit number 7675 be in all things rescinded and cancelled. As grounds therefor your Plaintiff would show the Court the following, to-wit:

1. When elected as an underwriting member at LLOYD'S, Plaintiff was required to lodge as a deposit a letter of credit with LLOYD'S calculated on the premium income at a means deposit ratio. Thereafter, the Plaintiff was required to provide a letter of credit from ALLIED BANK OF TEXAS to be confirmed by the advising bank of LLOYD'S, the Defendant COUTTS & COMPANY OF LONDON. This requirement resulted in ALLIED BANK OF TEXAS issuance of a letter of credit number 7675, dated November 21, 1980 in

the amount of 70,000 pounds to expire on December 31, 1985. Said letter of credit was subsequently amended by proper amendments to the letter of credit to be increased by 37,055.50 pounds sterling to a total credit of 107,055.50 and subsequently amended to be decreased by the amount of 35,000 pounds sterling. This letter of credit was further amended to expire on December31, 1989. True and correct copies of said letter of credit with attached amendments have been attached hereto and incorporated herein as Plaintiff's Exhibit "A". These letters of credit are in essence obligations of the bank payable to LLOYD'S, Defendant via their advising bank, Defendant COUTTS & COMPANY available by a sight draft by LLOYD'S drawn on ALLIED BANK OF TEXAS.

2. As the result of the unlawful acts, conduct and practices on the part of the Defendants, OAKELEY VAUGHAN UNDERWRITING LIMITED, CHARLES A. B. ST. GEORGE, JAMES C. B. ST. GEORGE, MARK E. P. ST. GEORGE, EDWARD ST. GEORGE, and OAKELEY VAUGHAN AND COMPANY LIMITED and LLOYD'S described above, your Plaintiff, as a name on syndicates 420, 551 and 862 has incurred substantial losses and is currently being asked to pay very substantial sums to meet the claims and losses which have been incurred in the 1981 through 1983 accounts. By virtue of the above named Defendants' mismanagement of the syndicates in question, said claims and losses have resulted in deficits in the syndicate accounts. Your Plaintiff has now been notified by the Defendants to make good the deficit by cash calls and in the event cash calls are not made, then LLOYD'S will draw down on the deposits held by them on your Plaintiff's behalf by virtue of the letter of credit 7675 made payable to Defendant, LLOYD'S, as beneficiary thereunder.

3. In view of the threats of LLOYD'S to make demand for payment on letter of credit number 7675, it has been necessary to seek injunctive relief in addition to affirmative damages described above. Your Plaintiff would show this Honorable

Court that should the bank pay over any or all of the aforesaid monies to LLOYD'S, on LLOYD'S demand your Plaintiff would be in a position of not being able to recover any such sum advanced from the Defendants, OAKELEY VAUGHAN UNDERWRITING LIMITED, CHARLES A. B. ST. GEORGE, JAMES C. B. ST. GEORGE, MARK E. P. ST. GEORGE, EDWARD ST. GEORGE, and OAKELEY VAUGHAN AND COMPANY LIMITED and LLOYD'S, your Plaintiff would suffer immediate and irreparable harm and injury for which there is no adequate remedy at law. Further, if ALLIED BANK OF TEXAS should comply with LLOYD'S demand for payment of any or all of the said monies pursuant to letter of credit 7675, your Plaintiff would be obligated to pay the bank any and all sums of money which the Defendant, LLOYD'S would be able to draw down on said letter of credit. Further, by payment of the same your Plaintiff would be deprived of the use of said sums during the pendency of any cause of action to determine the rights of the parties.

4. For the harm and damage done to your Plaintiff, and for the harm and damage that will continue, but for the intervention of this Court, your Plaintiff in short has no adequate remedy at law and for these reasons, your Plaintiff asserts that the damage and harm to your Plaintiff which would result from the Defendants, LLOYD'S and COUTTS & COMPANY being able to draw down on letter of credit 7675 would be continuing in nature and culminate and manifest injustice to your Plaintiff.

5. On September 12, 1986, this Honorable Court entered an Order Granting Temporary Injunction as prayed for herein and in Plaintiff's Original Petition. This Order Granting Temporary Injunction is in full force and effect until further Order of the Court and a copy is attached hereto as Exhibit "C".

WHEREFORE, Plaintiff requests and prays that ALLIED BANK OF TEXAS be temporarily restrained and enjoined pending a hearing hereon, from honoring any demands by the Defendant, of LLOYD'S or its advising bank, the Defendant COUTTS

& COMPANY on the aforesaid letter of credit number 7675 and that on a hearing hereof the Defendant ALLIED BANK OF TEXAS be temporarily enjoined from dispersing any such funds or any part thereof; that all Defendants be cited to answer this Petition and Application for Temporary Restraining Order and Temporary Injunction; and that on final judgment hereof that said letter of credit number 7675 be in all things rescinded and cancelled and that your Plaintiff have all additional relief as previously prayed for herein together with all further relief, general or special, at law or in equity to which your Plaintiff may show himself entitled.

Respectfully submitted,

HIRSCH, GLOVER, ROBINSON
& SHEINESS

By: _____

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